Supreme Court, U.S.
FILED
09-360 SEP 24 2009
OFFICE OF THE CLERK

141

No.

In The Supreme Court of the United States

SAMUEL M. LEVINE,

Petitioner,

- against -

EDWARD McCABE and JONATHAN LIPPMAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SAMUEL M. LEVINE, ESQ.
*Attorney and Petitioner Pro Se**
711 Shore Road (2E)
Long Beach, New York 11561
(516) 889-0496

* *Counsel of Record*

QUESTIONS PRESENTED

1. Should sitting judges in all State Courts be allowed to ANNOUNCE their views about administrative problems, or court practices and procedures, to higher judicial authorities under the protection of the First Amendment, without suffering judicial and political retaliation by higher judicial authorities who may punish the judge by a deprivation of benefits or denial of recall for continued court service as a Judicial Hearing Officer after retirement or end of a term in office? (See *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).)

2. Are judges in any court in the federal or state courts' judicial systems entitled to civil rights protections under the First Amendment's Right to Freedom of Speech, as well as the Fourteenth Amendment Rights of Due Process and Equal Protection of Laws, when exercising their privilege and right to "engage in activities to improve the law, the legal system, and the administration of justice," pursuant to Canon 4 of the Code of Judicial Conduct promulgated by the American Bar Association and State codes? (See 22 NYCRR Sections 100.4(c)(1) and (2) and (3); 100.5(A) and 100.6; also, *Republican Party of Minnesota v. White*, supra; also, *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Elrod v. Burns*, 427 U.S. 507, and *Branti v. Finkel*, 445 U.S. 507.)

3. Is New York State's statutory scheme of appointing Judicial Hearing Officers unconstitutional in that it deprives elected or appointed judges whose terms have expired or terminated at age 70, the rights of due process and equal protection of laws under the Fourteenth Amendment? (See New York Judiciary Law § 850(1) and 22 NYCRR Part 122, §§ 100.4(c)(1); 100.4(C)(2)(a); 100.4(C)(3); 122.1; 122.2(a), 122.2(c).)

4. Should the extensive errors by trial judge Hurley in the three pre-trial motions to Dismiss the Complaints and Summary Judgment as adopted and affirmed by the United States Court of Appeals for the Second Circuit, serve as the basis of a reversal by the United States Supreme Court and for a Remand to the District Court for a trial by a jury?

5. Was the United States Court of Appeals for the Second Circuit three-judge panel in error by affirming (in a Summary Order) the Judgment of the District Court which granted Summary Judgment to Respondents?

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are identified in the case caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

TABLE OF AUTHORITIES viii

TABLE OF STATUTES AND RULES x

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

CONCISE STATEMENT OF THE CASE 6

SUMMARY OF ARGUMENT 8

REASONS FOR GRANTING THE PETITION 16

I. THE SUPREME COURT OF THE UNITED STATES IS THE COURT OF LAST RESORT FOR PETITIONER LEVINE AND ALL OTHER SITTING OR RETIRED JUDGES IN ALL STATE COURTS SIMILARLY SITUATED, ASKING TO HAVE THEIR CONSTITUTIONAL RIGHTS PROTECTED AND PREVENT JUDICIAL RETALIATION AND DISCRIMINATION 16

II. THE SUPREME COURT IS BEING ASKED TO APPLY ITS RULES IN *REPUBLICAN PARTY OF MINNESOTA v. WHITE*, 536 U.S. 765 (2002) AND *RUTAN v. REPUBLICAN PARTY OF ILLINOIS*, 497 U.S.62 (1990) TO PROTECT THE CONSTITUTIONAL AND CIVIL RIGHTS OF ALL JUDGES IN STATE COURTS 16

III. SIGNIFICANT FEDERAL QUESTIONS ARE INVOLVED RELATING TO THE CIVIL RIGHTS OF ALL STATE COURT JUDGES WHO WISH TO PROTECT THEIR RIGHTS IN FEDERAL COURTS, USING 42 U.S.C. 1983..... 16

IV. THE SUPREME COURT IS BEING ASKED TO REVERSE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT PANEL WHICH AFFIRMED THE THREE MEMORANDUM ORDERS OF UNITED STATES DISTRICT COURT JUDGE (EASTERN DISTRICT OF NEW YORK) HON. DENIS R.HURLEY..... 17

V. RESPONDENTS RETALIATED AGAINST PETITIONER BECAUSE OF HIS ELECTION AND REPORTS ON COURT PROBLEMS, BY DENYING HIM AN APPOINTMENT AS A JUDICIAL HEARING OFFICER - A VIOLATION

OF HIS RIGHT TO FREEDOM OF SPEECH....17

VI. ERRORS IN THE HURLEY ORDER OF FEBRUARY 23, 2005....17

VII. ERRORS IN THE ORDER OF SEPTEMBER 19, 2006....18

VIII. ERRORS IN THE ORDER OF DECEMBER 17, 2007....19

CONCLUSION....19

APPENDICES

Appendix A
Levine Memo "200 Day Report for 1997" Dated July 23, 1997....1a

Appendix B
Levine Memo Dated February 10, 1997....3a

Appendix C
Biographic Statement of Hon. Samuel M. Levine, March 1999....7a

Appendix D
Summary Order of the United States Court of Appeals, Second Circuit Dated June 26, 2009....9a

Appendix E
Memorandum and Order of District
Court (E.D.N.Y.), Hon. Denis R. Hurley
Dated February 23, 2005 .....13a

Appendix F
Memorandum and Order of District
Court (E.D.N.Y.), Hon. Denis R. Hurley
Dated September 19, 2006.....39a

Appendix G
Memorandum and Order of District
Court (E.D.N.Y.), Hon. Denis R. Hurley
Dated December 17, 2007 .....57a

Appendix H
Verified Complaint
Dated October 2, 2003.....80a

Appendix I
Amended Complaint
Dated November 18, 2005.....92a

Appendix J
Second Amended Complaint
Dated May 5, 2006 .....103a

TABLE OF AUTHORITIES

Branti v. Finkel,
445 U.S. 507 i

Cleveland Board of Education v. Laudermill,
470 U.S. 532 9

Elrod v. Burns,
427 U.S. 507 i

Lemon v. Kurtzman,
403 U.S. 602 (1971) 15

Levine v. McCabe and Lippman,
United States District Court, Eastern District of New York, Hurley, D.C.J Docket # 03CV6420; Three Memorandum Orders, December 17, 2007, LEXIS 92381; U.S. Dist. LEXIS 66940, on September 19, 2006 7

Monell v. Department of Social Services of New York, 436 U.S. 658 (1978) 13

Mount Healthy City School District v. Doyle,
429 U.S. 274 (1977) 11

National Railroad Passenger Corp. v. Morgan,
536 U.S. 101 (2002) 14

Owen v. City of Independence,
445 U.S. 622, 651 (1980) 15

Perry v. Sinderman,
408 U.S. 593 (1972) 13

Republican Party of Minnesota v. White,
536 U.S. 765 (2002) ..... i, v, 16

Rutan v. Republican Party,
110 S.Ct. 2729, 2736 (1990)..... 11, 14

Rutan v. Republican Party
(497 US at 72) 11

Rutan v. Republican Party of Illinois,
497 U.S. 62 (1990)..... i, v, 16

TABLE OF STATUTES AND RULES

22 NYCRR § 100.4(C)(1) i,ii,2

22 NYCRR § 100.4(C)(2)(a) i,ii,3

22 NYCRR § 100.4(C)(3) i,ii,3

22 NYCRR § 100.5(A) i

22 NYCRR § 100.6 i

22 NYCRR § 122.1 ..... ii,3

22 NYCRR § 122.2 ..... ii,4

42 U.S.C. § 1983 5

42 U.S.C. § 1988(b) 5

CANON 4 OF THE CODE OF JUDICIAL CONDUCT, Promulgated by the American Bar Association and Adopted by the New York State Bar Association 2

NEW YORK STATE JUDICIARY LAW § 850(1) 2

Schwartz on Section 1983, Litigation Volume 3, § 3.11 B - First Amendment Retaliation Claims; and § 3.11 D - Public Employee Political Affiliation Claims 11

Schwartz on Section 1983, § 16.04(A) 15

U.S. CONSTITUTION, FIRST AMENDMENT 6

U.S. CONSTITUTION, FOURTEENTH AMENDMENT 6

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit issued a Summary Order dated June 26, 2009 affirming the three Memoranda-Orders of District Court Judge Denis R. Hurley, Eastern District of New York, (03-CV-6420), dated February 23, 2005, September 19, 2006 and December 17, 2007.

STATEMENT OF JURISDICTION

Subject matter jurisdiction of the United States District Court for the Eastern District of New York was conferred pursuant to 18 U.S.C. § 1961, *et seq.*

Appellate jurisdiction was conferred on the United States Court of Appeals, Second Circuit, under 28 U.S.C. §§ 158 and 1291.

Pursuant to 28 U.S.C. § 2101 and Rule 13, Rules of the Supreme Court of the United States, this Petition for A Writ of Certiorari was filed within ninety (90) days after entry of the Summary Order dated June 26, 2009.

STATUTORY PROVISION INVOLVED

The statutory provision for this appeal to the Supreme Court of the United States is 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

JUDICIARY LAW § 850(1), (New York State
Designation of Judicial Hearing Officers

1. Subject to the provisions of subdivision three of this section and to rules of the chief administrator of the courts, any person who has served as s judge or justice of a court of record of the unified court system or a city court which is not a court of record, who no longer holds judicial office, may, upon his application, be designated by the chief administrator as a judicial hearing officer upon a determination by the chief administrator (a) that the former judge has the mental and physical capacity to perform the duties of such office and (b) that the services of that former judge are necessary to expedite the business of the courts.

CODE OF JUDICIAL CONDUCT Promulgated by the American Bar Association and adopted by the New York State Bar Association:

"Canon 4: A judge may engage in activities to improve law, the legal system and the administration of justice."

22 NYCRR. Rules of the Chief Administrator of the Court (New York State):

22 NYCRR § 100.4(C)(1): A full time judge shall not appear at a public hearing before an executive or legislative body or official except on matters concerning the law, the legal system and the

administration of justice, or except when acting pro se in a matter involving the judge or the judge's interests.

22 NYCRR § 100.4(C)(2)(a): A full-time judge shall not accept appointments to a government committee or commission or other governmental position that is concerned with issues of fact or policy in matters other than the improvement of the law, the legal system, or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

22 NYCRR § 100.4(C)(3): A judge may be a member or serve as an officer, director, trustee or non-legal advisor of an organization or government agency devoted to the improvement of the law, the legal system or of an educational, religious, charitable, cultural, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this part.

22 NYCRR § 122.1 Application: (a) Any person who has served for at least one year as a judge or justice of a court of the Unified Court System, other than a town or village court, and who no longer is serving in such capacity, except a person who was removed from a judicial position pursuant to section 22 or Article VI of the constitution, may make application to the Chief Administrator of the Courts to be designated as a judicial hearing officer pursuant to article 22 of the Judiciary Law. The Chief administrator, upon consultation with the Presiding

Justice of the appropriate Appellate Division, may waive the one-year service eligibility requirement where the background of the judge, combined with the length and nature of his or her judicial service, permit a finding that the judge meets the qualifications set forth in section 122.2(a) of this Part. The application shall be in such form as may be provided by the Chief Administrator, which shall contain items requesting prior judicial experience, the nature of judicial service sought, and whether any actions against the judge have been taken by, or any claims are pending before, any professional disciplinary body.

22 NYCRR § 122.2. Initial Designation: (a) The chief administrator of the courts, in his or her discretion, may designate as a judicial hearing officer an eligible person who files an application pursuant to § 122.1 of this Part upon determination that the applicant has the physical and mental capacity, competence, work ethic, experience and judicial temperament necessary to perform the duties of a judicial hearing officer, and is well qualified to serve on the panels in the courts to which he or she will be designated. (c). In determining whether to designate an applicant as a judicial hearing officer, the Chief Administrator shall consult with (1) the Presiding Justice of the appropriate Appellate Division, (2) the appropriate Deputy Chief Administrator for the Courts, within or outside the City of New York, (3) the appropriate administrative judge, who shall submit a written evaluation of the applicant, and (4) the appropriate judicial hearing officer selection advisory committee established pursuant to

subdivision (e) of this section.

42 U.S.C. § 1983 Civil Action for Deprivation of Rights: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988(b) Attorney's Fees: In any action or proceeding to enforce a provision of sections 1981, 198la, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*], or section 13981 of this title,, [FN1] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such

officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

U.S. Constitution, First Amendment. Freedom of Speech: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Fourteenth Amendment. Due Process and Equal Protection: **Section 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONCISE STATEMENT OF THE CASE

Petitioner Levine had been an attorney since December of 1950. He won an election as a District Court Judge in Nassau County in 1996. His title was President of the Board of Judges of the District Court of Nassau County. He was then denied the administrative powers of that title by Respondent

McCabe, which were performed by his predecessor. The three Complaints allege that Respondent McCabe (the Administrative Judge for the Courts of Nassau County), and Respondent Lippman (the Chief Administrative Judge for all New York State Courts) denied Levine the appointment as a Judicial Hearing Officer after Levine retired at age 70 under the mandatory retirement law. Levine alleges the actions taken by Respondents McCabe and Lippman were in violation of his Civil Rights under 42 U.S.C. 1983 for the reasons stated above - including Denial of Free Speech and political retaliation, bias, prejudice, discrimination and denied equal protection laws. Respondent McCabe was a Republican elected to the Supreme Court after serving as a Nassau County attorney. Petitioner Levine was a Democrat who won an election to the District Court in 1996.

On December 23, 2003, Petitioner Levine filed the present action (*Levine v. McCabe and Lippman*) in the United States District of New York, Central Islip Courthouse. (Docket # 03CV6420 [DRH] [ETB].) The relief sought included five causes of action, namely:

FIRST: Declaratory Judgment declaring New York State Statutory Scheme relating to the Appointment of Judicial Hearing Officers (JHO herein) to be unconstitutional;

SECOND: Declaring Petitioner Levine's Civil Rights have been violated (42 U.S.C. 1983);

THIRD: Money Judgment for damages totaling One Million Two Hundred Thousand Dollars;

FOURTH: Legal fees (42 U.S.C. 1988);

FIFTH: Other relief as may be just and proper.

An Amended Complaint dated November 18, 2005 further alleging violations of Petitioner's Civil Rights, Denial of Free Speech, Political Retaliation, Bias and Prejudice, with the same prayers for relief.

A Second Amended Complaint dated May 5, 2006 further alleged further Violations of Petitioner's Civil Rights (42 U.S.C. 1983); Denial of Free Speech; Political Retaliation; Bias; Prejudice; Discrimination; and Equal Protection Laws because Respondents failed to appoint Levine as a Judicial Hearing Officer, particularly for service as a JHO at the District Court and its Traffic and Parking Violation Agency.

SUMMARY OF ARGUMENT

Petitioner Levine appeals to the Supreme Court of the United States to correct an injustice suffered by him because he was denied the opportunity to continue his lifelong career (over 50 years) as an attorney and serving the public. His desire to continue after age 70 as a Judicial Hearing Officer, was denied because of the administrative decisions and bias, prejudice, discrimination and conduct of Respondents McCabe and Lippman, who improperly denied his applications to serve as a Judicial Hearing Officer after retiring as a Judge. Levine also seeks to have the Judicial Hearing Officer statutory scheme of appointing JHO's to be in violation of his Civil Rights and unconstitutional. His freedom of speech was violated. Respondents

retaliated against Petitioner because of his election and reports on court problems, by denying him an appointment as a Judicial Hearing Officer, a violation of his Freedom of Speech Rights.

Respondents were not entitled to any immunity defense.

A Judicial Hearing Officer at the Traffic and Parking Violation Agency in Nassau County is not a public policy maker.

POINT 1: NEW YORK'S STATUTORY SCHEME TO APPOINT JUDICIAL HEARING OFFICERS IS UNCONSTITUTIONAL

Petitioner has been denied the privilege of continuing his public service as a judge, despite the fact that he is well qualified physically and professionally to perform the duties of a judge and Judicial Hearing Officer. Respondents have not offered any reasons or facts to challenge Petitioners qualifications or justify a denial. His statutory standards and administrative policies (22 NYCRR §122.2) have been met by Petitioner. (He passed the physical exam - twice.) (22 NYCRR Part 122.)

Petitioner has a protected property right involving public employment and public benefits. (*Cleveland Board of Education v. Laudermill*, 470 US 532.)

Retired Judges are invited to apply for Judicial Hearing Officer Status under the JHO Statutory Scheme. Property rights are involved - the right to continue as a judge. Administrative standards and policies exist similar to sitting judges. The Code of Judicial Conduct still applies to Judicial Hearing

Officers. Liberty interests are also involved. At all times, Respondents were performing administrative functions about judicial hearing officers and Levine's request.

POINT 2: PETITIONER'S CIVIL RIGHTS WERE VIOLATED (42 U.S.C. 1983) (See Complaints in Appendices)

This Petitioner was in fact deprived of personal and property rights. As a retired judge, he was qualified and met the standards and policies established for Judicial Hearing Officers. (Petitioner passed the physical exam.) (See NYCRR Part 122.) The reasons he was denied the appointment as a Judicial Hearing Officer were the bias and prejudice of Respondent McCabe; the discriminatory acts of political retaliation and age discrimination; and the denial of his rights of due process and equal protection of law.

POINT 3: PETITIONER WAS THE VICTIM OF POLITICAL RETALIATION

Petitioner Levine as a sitting judge and as President of the Board of Judges of the District Court of Nassau County, made statements and filed complaints with Respondents concerning the administrative and judicial problems in the District Court, during his tenure in 1997, 1998 and 1999. During that period of time, the New York State Office of Court Administration did in fact carry out inquiries and investigations of the complaints Petitioner Levine submitted to higher judicial authorities,

including both Respondents.

Retaliation may consist of deprivation of any non trivial commodity (such as a job or position), because the individual engaged in constitutionally protected activity (free speech). In a Section 1983 case when government motive is pertinent to the constitutional inquiry, the claimant need not show that the retaliation was in the form of a deprivation of a constitutionally protected right or interest. (*Rutan v. Republican Party*, 110 S.Ct. 2729, 2736 [1990].)

In the excellent books by "Schwartz on Section 1983 Litigations," the author has made the following statements about - FIRST AMENDMENT RETALIATION CLAIMS at Section 3.11(B) in Volume 3, page 338: "A Section 1983 claimant who asserts a free speech retaliation claim is not required to demonstrate that the illicit factor was the sole or even dominate motive for the government action." (*Mount Healthy City School District v. Doyle*, 429 US 274 (1977).) There are good reasons for this.

When a governmental motive is pertinent to the constitutional inquiry, the claimant need not show that the retaliatory deprivation was a constitutionally protected right or interest. ... In *Rutan v. Republican Party* (497 US at 72), the court held that the fact that the plaintiffs had no legal entitlement to promotion, transfer or recall, was beside the point.

POINT 4: PETITIONER WAS THE VICTIM OF AGE DISCRIMINATION

Petitioner did not enjoy the benefit of an extended term to age 76 which Supreme Court Judges

in New York State enjoy or the lifetime of judicial service enjoyed by Federal Court Judges. Clearly, Petitioner was the victim of age discrimination. Petitioner was denied the opportunity to continue to serve the public as a Traffic Court Judge since Respondents unlawfully deprived him of the Judicial Hearing Officer status.

POINT 5: PETITIONER'S RIGHT TO FREEDOM OF SPEECH WAS VIOLATED

Petitioner carried out his obligations and rights "to engage in activities to improve the law, the legal system and the administration of justice." (Code of Judicial Conduct - 22 NYCRR Sec. 100.4.) The activities, reports and memos submitted by Petitioner were met with the retaliatory action of denial of his JHO application.

The best example of the many pages of memos written by Petitioner Levine to higher judicial authorities (as expressions of his right to free speech) is the memo dated July 23, 1997 (Exhibit A in the Appendices) to higher judicial authorities and the Board of Judges.

Another letter, dated February 10, 2007 (Appendix B), to other judicial or higher authorities listed eighteen subjects that were talked about in the many memos in 1997, 1998 and 1999 that dealt with serious court problems, suggested improvements, and recommendations by Petitioner.

Petitioner carried out his obligations and rights "to engage in activities to improve the law, the legal system and the administration of justice." (Code of Judicial Conduct - 22 NYCRR Sec. 100.4.) The

activities, reports and memos submitted by Petitioner were met with the retaliatory action of denial of his JHO application by Respondents.

POINT 6: STATUTES OF LIMITATIONS WERE NOT VIOLATED

Even if the three-year limit did apply, the last act of Respondents in denying Petitioner's application took place on December 12, 2001.

POINT 7: FREEDOM OF SPEECH VIOLATIONS

Petitioner was entitled to the benefit of an appointment as a Judicial Hearing Officer and cannot be denied that benefit on a basis that infringes on his constitutionally protected freedom of speech, even if he has no entitlement to that benefit (*Perry v. Sinderman*, 408 U.S. 593 [1972].)

POINT 8: PETITIONER WAS THE VICTIM OF CIVIL RIGHTS VIOLATIONS, POLITICAL RETALIATION AND DISCRIMINATION

42 U.S.C. 1983 - Local government entities and officials can be sued in their official capacities under Section 1983 for monetary, declaratory or injunctive relief where "the action that is alleged to be unconstitutional, implements or executes a policy, statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers.(*Monell v. Dept. Social Services of New York*, (436 U.S. 658 [1978].)

Petitioner Levine, as a sitting judge and as

President of the Board of Judges of the District Court of Nassau County, made charges and filed complaints with Respondents concerning the administrative and judicial problems in the District Court, during his tenure in 1997, 1998 and 1999. During that period of time, the New York State Office of Court Administration did in fact carry out inquiries and investigations of the charges and complaints Petitioner Levine submitted to higher judicial authorities, including both Respondents.

Retaliation may consist of deprivation of any non trivial commodity (such as a job or position), because the individual engaged his constitutionally protected activity (free speech). In a Section 1983 case when government motive is pertinent to the constitutional inquiry, the claimant need not show that the retaliation was in the form of a deprivation of a constitutionally protected right or interest. *(Rutan v. Republican Party,* 110 S.Ct. 2729, 2736 [1990].)

The Statute of Limitations should NOT BAR the Levine Complaint. Petitioner Levine submits that the violations of the constitution (free speech, due process and equal protection) far transcend and are of greater importance and priority than the personal injury action with a three-year limitation. These constitutional violation actions (particularly free speech, due process and equal protection) should not be limited to violations that accrue only in the past three years following the illegal acts. The three-year rule should NOT apply when the acts complained of are CONTINUOUS ACTS (as in the Levine case). *(National Railroad Passenger Corp. v. Morgan,* 536 US 101 ['02].)

The Supreme Court recognizes that the

damages component in Section 1983 actions are "a vital component ... for vindicating cherished constitutional guarantees. *"(Owen v. City of Independence,* 445 US 622, 651 ['80].) In the instant case, Petitioner Levine was deprived of compensation as a Judicial Hearing Officer and was unable to obtain suitable employment because of the unfavorable damage to his reputation. (Schwartz, Section 16.04(A).)

The United States Supreme Court has been willing to strike down executive and administrative action (as in the Levine case) on the basis of what it determines to be improper motives or purposes. *(Lemon v. Kurtzman,* 403 US 602 ['71].) In the Levine case, Respondents' motives were clear - to deny Levine the Judicial Hearing Officer appointment because he was a "whistle blower" exercising his right of free speech about "Problems in the District Court" and because he was a Democrat and replaced a favored Judge who was a Republican.

POINT 9: AS TO THE HURLEY ORDER FILED DECEMBER 17, 2007 - PETITIONER'S CIVIL RIGHTS WERE VIOLATED (42 U.S.C. 1983)

Petitioner Levine has suffered the STIGMA OF INCOMPETENCE AS A JUDGE by the Respondents' actions, decisions and denials. His reputation has been severely tarnished. NO FAIR HEARING AND NO FAIR CONSIDERATION has been provided to Petitioner Levine to obtain the position of Judicial Hearing Officer. NO DUE PROCESS procedures were available, only a perfunctory, introductory meeting with Respondents' Judicial Hearing Officer Advisory

Committee. They then met alone without providing Petitioner Levine with any of the Respondent's McCabe's reports and papers made available to them. Petitioner was never given copies of those reports and papers, nor provided with a fair opportunity to be heard or respond to the secret allegations submitted by Respondent McCabe. That is not due process of law or equal protection of law.

REASONS FOR GRANTING THE PETITION

I. The Supreme Court of the United States is the court of last resort for Petitioner Levine and all other sitting or retired judges in all State Courts similarly situated, to have their constitutional rights protected, and prevent judicial retaliation and discrimination.

II. The Court is being asked to apply and extend its Rules in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), to ensure that sitting judges in State Courts have the First and Fourteenth Amendments' rights and protection when they announce their views and opinions on administrative problems and court practices to higher judicial authorities without fear of judicial retaliation; or they win an election that was very disappointing and upsetting to higher judicial authorities.

III. Significant Federal Questions are involved, namely the rights of sitting judges in State Courts to institute an action under 42 U.S.C. 1983 whenever they become the victim of adverse action or

denials by higher judicial authorities in failing to be recalled for continued judicial service following their age-related retirement or end of an elected term. Alleged violations of constitutional and civil rights of local State judges should be tried in Federal Court when Federal questions are involved.

IV. The Supreme Court is being asked to reverse the United States Court of Appeals For The Second Circuit panel which affirmed the three Memorandum-Orders of United States District Court Judge (Eastern District of New York) Hon. Denis R. Hurley.

V. Respondents retaliated against Petitioner because of his election and reports on court problems, by denying him an appointment as a Judicial Hearing Officer - a violation of his right to Freedom of Speech.

The three Hurley Decisions included the following ERRORS OF LAW

VI. Errors in Hurley order of February 23, 2005:

1. The Court erred in the Dismissal of the First Complaint.

2. The Court erred in ruling a three year Statute of Limitations on causes of action dealing with "continuing acts of violating petitioner's Civil Rights beyond an initial three year period."

3. The Court erred in determining that - "Levine Has Failed to State a Cognizable 'Privileges and Immunities, Due Process or Equal Protection

Claim."

4. The Court erred in concluding that 'Levine has failed to state a "selective enforcement" or "class of one" equal protection claim.

5. The court erred in granting a dismissal of the § 1983 Claim against Respondent McCabe and the Title VII Claim, as well as Leave to Serve a Second Amended Complaint.

6. The court erred in concluding that Judicial Hearing Officers (JHO herein), particularly JHO's in the Nassau County Traffic and Parking Violation Agency (T.P.V.A. herein) are public policy makers for First Amendment purposes.

7. The Court erred in denying Petitioner's Motion to Reconsider and that Respondents' Motion for Summary Judgment was granted.

8. The court erred in failing to recognize and conclude that the appointment process for appointing JHO's to the T.P.V.A. was flawed, illegal and in violation of Petitioner's rights.

9. The court erred in determining that - "Levine Has Failed to State a Cognizable "Privileges and Immunities, Due Process or Equal Protection Claim."

10. The court erred in concluding that "Levine has failed to state a selective enforcement" or "class of one" equal protection claim.

VII. Errors in the order of September 19, 2006:

11. The court erred in granting a dismissal of the § 1983 Claim against Respondent McCabe and the Title VII claim, as well as Leave to Serve a Second Amended Complaint.

VIII. Errors in the order of December 17, 2007:

12. The court erred in concluding that Judicial Hearing Officers (JHO herein), particularly JHO's at the Nassau County Traffic and Parking Violation Agency (T.P.V.A. herein) are public policy makers for First Amendment purposes.

13. The court erred in denying Petitioners Motion to Reconsider and that Respondents' Motion for Summary Judgment was granted.

14. The court erred in failing to recognize and conclude that the appointment process for appointing JHO's to the T.P.V.A. was flawed, illegal and in violation of Petitioner's rights.

CONCLUSION

Wherefore Petitioner prays that a Writ of Certiorari will be granted.

Respectfully submitted,

HON. SAMUEL M. LEVINE, ESQ.
Attorney and Petitioner *Pro Se*
711 Shore Road (2 E)
Long Beach, NY 11561
(516) 889-0496

APPENDIX

APPENDIX A
TWO HUNDRED DAY REPORT OF 1997

DISTRICT COURT OF NASSAU COUNTY
ADMINISTRATIVE CHAMBERS
99 MAIN STREET
HEMPSTEAD, NEW YORK 11550
SAMUEL M. LEVINE
PRESIDENT OF THE BOARD OF JUDGES

July 23, 1997

To: Administrative & Supervising Judges

To: Members of the Board of Judges of the District Court of Nassau County

Re: TWO HUNDRED DAY REPORT FOR 1997

I would like to outline some of the matters that I have identified or that have come to my attention in the past two hundred days. They include the following:

1. SECURITY for the building.

2. BUILDING PROBLEMS, improvements and repairs (particularly to the heating, ventilation and air conditioning systems and parking garage).

3. The ROLE OF THE BOARD OF JUDGES in administration, operation, judicial and clerical functions in our Court.

4. UTILIZATION OF JUDGES and the concept of an Individualized Assignment System.

5. EXPANDED USE OF ARBITRATORS, JUDICIAL HEARING OFFICERS and other ALTERNATIVES FOR DISPUTE RESOLUTION (especially for the proposed expanded Civil Jurisdiction to $50,000).

6. TOWN COURTS and/or NIGHT COURTS for the three towns.

7. PROTECTION OF THE RIGHTS OF LITIGANTS (particularly pro se tenants and others without attorneys).

8. CIVIL PRACTICE PROCEDURES relating to the caseload volume for motions, pre-trial proceedings, settlements and trials.

9. ARREST WARRANTS for the large numbers of defendants not appearing for arraignment, trial or sentence and not answering personal appearance summonses.

I trust that we can move forward together to make certain that our District Court continues to provide the public and litigants with a court system that protects their rights and that adequately provides justice and enforcement of laws that we are sworn to apply and uphold.

_____/s/_____
Hon. Samuel M. Levine
President of the Board of Judges
District Court of Nassau County

APPENDIX B
LETTER TO MEMBERS OF THE BOARD OF JUDGES FOR NASSAU COUNTY COURTS

RE: LEVINE REPORTS ON PROBLEMS IN THE DISTRICT COURT OF NASSAU COUNTY

HON. SAMUEL M. LEVINE
Past President, Board of Judges
District Court of Nassau County (Ret.)
711 Shore Road (2-E)
Long Beach, New York 11561
Phone: (516) 889-0496

February 10, 2007

TO: Administrative and Supervising Judges
For Nassau County Courts

TO: Members of the Board of Judges of the District Court of Nassau County

The following is a SUMMARY OF THE LEVINE REPORTS ON PROBLEMS IN THE DISTRICT COURT OF NASSAU COUNTY. The full reports should be in the Judge Levine files with the Court Clerk. (My copies are available.) I urge that they be considered by Administrative and Supervising Judges and the Board of Judges.

A. PROBLEMS 1 to 9 (See attached Levine Memo of July 23, 1997 entitled "TWO HUNDRED DAY REPORT FOR 1997"):

Problem 1: Security for the building;
Problem 2: Building problems;

Problem 3: Role of the Board of Judges;
Problem 4: Utilization of Judges (an IAS system and active courtrooms);
Problem 5: Expanded use of Arbitrators, JHO's, Alternative Dispute Resolutions, and increased jurisdiction to $50,000;
Problem 6: Town Courts and Night Courts;
Problem 7: Protection of Rights of Litigants (pro se tenants, others, and a public friendly court);
Problem 8: Civil Practice Procedures (motions, pre-trials, telephone conferences, etc.);
Problem 9: Arrest Warrants.

B. "THE THREE HUNDRED DAY REPORT OF 1999", dated October 28, 1999, amplifies the problems in the Two Hundred Day Report of July 23, 1997 with more specific points and questions related to items 1 to 9 previously outlined.

C: PROBLEMS 10 to 14 ("ONE HUNDRED DAY REPORT FOR 1998" dated April 10, 1998):

Problem 10: Court Practices and Procedures - District Court, Civil and Criminal Code or Manual;
Problem 11: Court Administration - building, budget, personnel, etc.;
Problem 12: Public Friendly Courts for the public and self-represented;
Problem 13: Assigned Counsel for Criminal Case Defendants;

Problem 14: Court Reform and District Court Problems - plans by Chief Judge Kaye and the Legislature.

D. PROBLEMS 15 to 18 (My "ONE HUNDRED DAY REPORT FOR 1999" dated April 10, 1999):

Problem 15: Arraignments and other appearances by Electronic Appearances (see Part 106 Rules of Court) (Substantial cost savings possible);

Problem 16: Preliminary pre-trial conferences (and telephone conferencing);

Problem 17: An Individual Assignment System for all criminal cases;

Problem 18: The Board of Judges and President of the Board of Judges (functions and authority).

E. MY "FINAL 300 DAY REPORT FOR 1999" dated October 27, 1999 - recommending a District Court of Nassau County Advisory Committee for Court Reform changes in the District Court Act for Nassau County to include the recommendations I previously made in my reports. It also included my letter to the Chief Judge's Committee to Promote Public Trust and Confidence in the Legal System dated January 29, 1999 about protecting the rights of the poor, the elderly and people with disabilities.

I am prepared to assist the Court in expediting the disposition of civil case motions and trial by acting as Judicial Hearing Officer. This can be done through the use of pre-motion or pre-trial conferences (in Court or by telephone). The unique conference protocols I

established during my tenure met with great success and support by attorneys who benefitted by these methods.

I would appreciate the opportunity to attend a meeting of the Board of Judges. Also, to be part of any Advisory Committees established to deal with the problems and proposals I have outlined above.

I want to renew the comment I stated at the end of my "TWO HUNDRED DAY REPORT FOR 1997": "I trust that we can move forward together to make certain that our District Court continues to provide the public and litigants with a court system that protects their rights and that adequately provides justice and enforcement of the laws that we are sworn to apply and uphold."

HON. SAMUEL M. LEVINE
Past President, Board of Judges
District Court of Nassau County (Ret.)

SML/ag

cc: Hon. Jan Plumadore, D.C.A.J.
Hon. Anthony Marano, J.S.C.
Hon. Susan Kleuwer, J.D.C.
Hon. Christopher Quinn, J.D.C.

APPENDIX C
BIOGRAPHIC STATEMENT

DISTRICT COURT OF NASSAU COUNTY
ADMINISTRATIVE CHAMBERS
99 MAIN STREET
HEMPSTEAD, NEW YORK 11550

SAMUEL M. LEVINE
PRESIDENT OF THE BOARD OF JUDGES

March 1999

Judge Samuel M. Levine, the elected President of the Board of Judges of the District Court of Nassau County, New York, was born in 1929 and raised in Syracuse, New York. The son of Sophie and Joseph Levine, he graduated from Syracuse Central High School; Syracuse University in 1950 with a Bachelor's Degree in the School of Business Administration and a Juris Doctor Law Degree from Brooklyn Law School in 1953.

He has been married to Lee (Miller) for fifty years. She is an accomplished singer and performer with "Eve-N-Lee, the Heavenly Duo." They have three children; Judith, a bank real estate manager; Donald, a guidance counselor and psychotherapist; and Gary, a marketing specialist for Madison Square Garden.

He has been an attorney in government and general' law practice for over forty-two years; civic leader in Elmont and Oceanside; legal advisor and advocate for many organizations serving the poor, the elderly, persons with handicaps and taxpayers;

Arbitrator-District Court, Nassau County and Federal Court; member, National Academy of Elder Law Attorneys; former Chairman of the Committee on Social Service and Health Law of the Nassau County Bar Association; attorney with Nassau County for nineteen years; listed in "Who's Who in American Law"; Supreme Court, New York State - (1990 and 1995) Democratic Candidate; District Court, Nassau County - (1985, 1993, 1994 and 1996) Democratic Candidate; State Senate - (1964) Democratic Candidate; Presiding Supervisor, County of Nassau and Town of Hempstead - (1991) Democratic Candidate; Long Island Educational Leadership Conference (1972); School Aid Council of Long Island (1972) Chairman; Health and Welfare Council of Nassau County (former member); Nassau-Suffolk Health Systems Agency (former member); and Advisory Committees to the Governor and State Legislature.

His involvement and service to the poor, Senior Citizens and people with handicaps, included the following activities and groups; former Member of the Board of Visitors of Pilgrim State Psychiatric Center; Treasurer and Counsel to the New York State Council of Organizations for the Handicapped; Counsel to the League of Voters for the Handicapped; Voice for the Handicapped; Federation of Organizations for the State Institutions; Past President, Epilepsy Foundation of Long Island; Delegate to the White House Conference on Children and Youth by appointment of the President (1960); White House Conferences on Senior Citizens (1980) and Mental Health (1999).

APPENDIX D
SUMMARY ORDER

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

08-0296-cv
Levine v. McCabe

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation Co summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by die notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which die summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which, is publicly accessible without payment of fee (such as the database available at http://www.ca2.nscourts.gov/). If no copy is served by reason of the availability of-die order on such a database, the citation must include; reference to that database and die docket number of the case in which the order was entered.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl

Street, in the City of New York, on the 26 day of June, two thousand nine.

PRESENT:
ROGER J. MINER,
JOSE A. CABRANES,
PETER W. HALL,
Circuit Judges

SAMUEL M. LEVINE,
Plaintiff Appellant,

v. No. 08-0296-cv

EDWARD McCABE and
JONATHAN LIPPMAN,
Defendants-Appellees.

COUNSEL FOR APPELLANT:

THOMAS LIOTTI, Garden City, NY
(Samuel M. Levine, *pro se*, on the brief)

COUNSEL FOR APPELLEE:

DAVID LAWRENCE III, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Benjamin N. Gutman, Deputy Solicitor General, Michael Colodner, Counsel, Office of Court Administration, and John J. Sullivan, Assistant Deputy Counsel, on the brief), for Andrew M. Cuomo, Attorney General of the State of New York, Albany, NY

Appeal from a December 18, 2007 judgment of the United States District Court for the Eastern District of New York (Denis R. Hurley, Judge).

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Plaintiff- appellant Samuel M. Levine served as an elected Judge of the Nassau County District Court from 1997 until 1999, when he retired pursuant to a provision of New York's constitution mandating retirement at age seventy for judicial officers. *See* N.Y. Const Art VI, § 25(b). Following his mandatory retirement, plaintiff applied on several occasions to become a Judicial Hearing Officer, which requires an appointment at the discretion of the Chief Administrative Judge of New York's courts. *See* N.Y. Judiciary Law § 850 (2009); 22 N-Y- Comp. Codes R. & Regs. tit. 22 § 122.2 (2009). After his applications were denied, plaintiff sued former Nassau County Administrative Judge Edward McCabe and then-Chief Administrative Judge (now Chief Judge) Jonathan Lippman under 42 U.S.C- § 1 983, alleging violations of his rights to free speech, equal protection of the laws, and due process of law under the First and Fourteenth Amendments. Plaintiff also alleged, under several federal and state statutes, that he was the victim of impermissible discrimination on the basis of his age. In orders filed on February 23, 2005, September 19, 2006, and December 17, 2007, the District Court dismissed in part and granted summary judgment in part, resulting in judgment for defendants. We assume the parties'

familiarity with the underlying facts and procedural history of this case.

We review *de novo* a district court's grant of summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, construing all facts in favor of the non-moving party. *See, e.g, Paneccio v. Unisource Worldwide, Inc.*, 532 F-3d 101, 107 (2d Cir. 2008). Summary judgment is only warranted upon a showing "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We also review *de novo* a district court's dismissal of claims pursuant to Rule I2(b)(6), "construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002).

In this appeal, we have reviewed all of plaintiff's claims and affirm for substantially the reasons stated in the District Court's careful and comprehensive orders of February 23, 2005, September 19, 2006, and December 17, 2007. *See Levine v. McCabe,* No. 03-CV-6420, 2006 US. Dist. LEXIS 92381 (E.D.N.Y., Dec. 17, 2007); *Levine V. McCabe,* No. 03-CV-6420, 2006 U.S. Dist LEXIS 66940 (RD.N.Y. Sept. 19, 2006); *Levine v. McCabe,* 357 F. Supp. 2d 608 (EJD.N.Y. 2005).

CONCLUSION

We have considered all of plaintiff's arguments on appeal and find them to be unavailing. Accordingly, we AFFIRM the judgment of the District Court.

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk
By ___ _____/s/_____

APPENDIX E
MEMORANDUM AND ORDER
03-CV-6420 (DRH) (ETB)
February 23, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
SAMUEL M. LEVINE,

Plaintiff,

-against-

EDWARD F. Mc CABE, and
JONATHAN LIPPMAN,

Defendants.
----------X

03-CV-6420 (DRH) (ETB)
MEMORANDUM & ORDER

APPEARANCES:

SAMUEL LEVINE
Plaintiff Pro Se
711 Shore Road (2-E)
Long Beach, New York 11561

OFFICE OF THE ATTORNEY GENERAL OF NEW YORK
Attorneys for Defendants
300 Motor Parkway
Hauppauge, New York 11788
By: Susan M. Connolly, Esq.

HURLEY, District Judge:

I. Introduction

Plaintiff Samuel Levine, a retired Nassau County district judge, has brought the present Section 1983 suit against Defendants Jonathan Lippman, Chief Administrative Judge for the New York State Unified Court System, and Edward G. McCabe, the Administrative Judge of the courts of Nassau County. Levine alleges that the Defendants unfairly refused to appoint him to a position as a "judicial hearing officer," and that in doing so, they violated his constitutional rights. Levine seeks monetary damages, as well as a declaratory judgment that New York's entire statutory scheme governing the appointment of judicial hearing officers is unconstitutional. The Defendants have moved to dismiss Levine's claim pursuant to Federal Rule of Civil Procedure 12(b) (6). For the reasons that follow, the Defendants' motion is GRANTED, but Levine may move to amend his complaint.

II. Background

According to Levine's complaint and the documents attached thereto, Levine has been a practicing attorney in New York since 1950. He has been described as a "gadfly" and a champion of "seemingly hopeless causes." In 1996 he was elected to a term as a Nassau County district court judge for the county's "First District," and as such, apparently automatically became the "President of the Board of Judges" or the "presiding judge" of the Nassau County district courts. The New York Times described Levine as "a perennial Democratic also-ran in predominantly Republican Nassau County," and his election was apparently something of an upset. Levine states that as presiding judge of the Nassau County district courts, he was supposed to be "in charge of the daily operation and

administration of the District Court subject to the control and reporting to Defendant McCabe." But according to Levine, McCabe, as a Republican, maneuvered to keep all power and authority in his own hands. Levine also insists that McCabe "ignored and failed to act on many serious problems in the District Court set forth [in] Levine ['s] reports and recommendations," and made efforts to prevent Levine from presiding over a politically-charged case. McCabe's motives, insists Levine, were "political retaliation and prejudice" against him.

On December 31, 1999, having apparently reached the age of 70, Levine retired pursuant to the New York Constitution's mandatory judicial retirement provision.1 Shortly prior to his retirement, Levine applied to be designated as a judicial hearing officer, pursuant to the provisions of the New York Judiciary Law. Section 850 of that law states in relevant part:

> 1. Subject to the ... rules of the chief administrator of the courts, any person who has served as a judge or justice of a court of record of the unified court system . . . but who no longer holds judicial office, may, upon his application, be designated by the chief administrator as a judicial hearing officer upon a determination by the chief administrator (a) that the former judge has the mental and physical capacity to perform the duties of such office and (b) that the services of that former judge are necessary to expedite the business of the courts.

---

1 The New York Constitution, Article 6, §25, subdivision b state in relevant part: "Each judge of the district court shall retire on the last day of December in the year in which he or she reaches the age of seventy."

Pursuant to this law, the Chief Administrator of New York's Unified Court System has promulgated regulations governing the process of application for judicial hearing officer positions. Title 22 of the New York Compilation of Codes, Rules, and Regulations, Section 122.1 states in relevant part:

> Application. (a) Any person who has served for at least one year as a judge or justice of a court of the Unified Court System ... and who no longer is serving in such capacity ... may make application to the Chief Administrator of the Courts to be designated as a judicial hearing officer pursuant to article 22 of the Judiciary Law. ... The application shall be in such form as may be provided by the Chief Administrator, which shall contain items requesting prior judicial experience, the nature of judicial service sought, and whether any actions against the judge have been taken by, or any claims are pending before, any professional disciplinary body.

Section 122.2 of the regulations states in relevant part:

> Initial designation. (a) The Chief Administrator of the Courts, in his or her discretion, may designate as a judicial hearing officer an eligible person who files an application pursuant to section 122.1 of this Part upon determination that the applicant has the physical and mental capacity, competence, work ethic, experience and judicial temperament necessary to perform the duties of a judicial hearing officer, and is well qualified to serve on the panels in the courts to which he or she will be designated.
>
> (b) The applicant shall undergo a comprehensive physical examination by a physician designated

by the Chief Administrator, who shall issue a report to the Chief Administrator that the applicant has or has not the physical and mental capacity to perform competently the duties of a judicial hearing officer.

(c) In determining whether to designate an applicant as a judicial hearing officer, the Chief Administrator shall consult with (1) the Presiding Justice of the appropriate Appellate Division, (2) the appropriate Deputy Chief Administrator for the Courts, within or outside the City of New York, (3) the appropriate administrative judge who shall submit a written evaluation of the applicant, and (4) the appropriate judicial hearing officer selection advisory committee established pursuant to subdivision (e) of this section.

(d) The Chief Administrator also may consult with other appropriate persons and bar associations and conduct whatever investigation the Chief Administrator deems necessary to determine the qualifications of an applicant, including requiring additional medical examinations.

(e) (1) The Chief Administrator, after consultation with the Presiding Justice of the appropriate Appellate Division, shall establish judicial hearing officer selection advisory committees for [each] Judicial Department... (2) Every applicant for designation to the office of judicial hearing officer shall be evaluated prior to designation by the committee established for the principal jurisdiction in which the applicant applies to serve, which shall interview the applicant and may require the applicant to

> submit any appropriate materials. . . . The committee shall set forth whether each applicant is qualified to serve as a judicial hearing officer based upon competence, work ethic, experience and judicial temperament necessary to perform duties of a judicial hearing officer...

And Section 122.7 of the regulations states in full:

> "No vesting of rights. Nothing herein shall vest any person with any right to be designated as a judicial hearing officer, or to be designated to a panel, or to serve in any particular court or to be assigned to any particular proceeding or type of proceeding."

According to Levine, he satisfied the statutory and regulatory requirements, in that he was "well qualified" to be a judicial hearing officer, and his application included an "extraordinary array of supporting documentation" to prove it. On January 26, 2000, Levine was interviewed by the judicial hearing officer selection advisory committee appointed by Lippman for Nassau County. Levine believes that the committee received and reviewed a report from McCabe recommending that his application be denied, and that the committee recommended the same. In a letter dated March 9, 2000, Lippman informed Levine that his application had been denied. Levine's immediate request for reconsideration of that decision was denied in a subsequent letter from Lippman, dated March 30, 2000. Levine asserts that he was "denied the right and opportunity to receive a copy of [McCabe's] negative report and recommendations," that the Defendants "failed to submit or serve [him with] any written charges or complaints concerning his conduct or services or other facts impacting on the questions of competence,

work ethic, experience or judicial temperament," and that he was "denied notice of any such charges or complaints." On June 30, 2001, Levine submitted a new application to be a judicial hearing officer, this time in Queens County. This application was denied as well, but without any further interview or hearing.

On December 23, 2003, Levine filed the present suit pursuant to 42 U.S.C. §1983. He seeks a declaratory judgment that New York's statutory scheme for appointment of judicial hearing officers is unconstitutional, a declaratory judgment that the Defendants violated various types of his civil rights, as well as $1,200,000 in money damages and $300,000 in costs and fees from the Defendants. The Defendants have moved to dismiss the complaint for failure to state a claim upon which relief can be based.

III. Dismissal: Legal Standards

In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court must limit itself to the facts stated in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint. *Hayden v. County of Nassau,* 180 F.3d 42, 54 (2d Cir. 1999). The court must accept the factual allegations contained in the complaint as true, and view the pleadings in the light most favorable to the non-moving party, drawing all reasonable inferences in his favor. *Sheppard v. Beerman,* 18 F.3d 147, 150 (2d Cir. 1994), *cert. denied,* 513 U.S. 816 (1994). Dismissal under Rule 12(b) (6) is appropriate only if it appears beyond doubt that a plaintiff can prove no set of facts entitling him to relief in support of his claim. *Zerilli-Edelglass v. New York City Transit Auth.*, 333 F.3d 74, 79 (2d Cir. 2003).

The issue is not how likely the plaintiff is to ultimately prevail, but whether he is entitled to even offer evidence to support his claims. "Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test." *Weisman v. LeLandais*, 532 F.2d 308, 311 (2d Cir. 1976) (per curium) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). These standards apply with particular strictness where, as here, the complaint alleges civil rights violations. *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995).

Nevertheless, although a court must accept the facts alleged in the non-movant's complaint, "conclusory allegations of the legal status of the defendants' acts need not be accepted as true for the purposes of ruling on a motion to dismiss." *In re Am. Exp. Co. Shareholder Litig.*, 39 F.3d 395, 400 n.3 (2d Cir. 1994). "[Courts do `not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened.' " *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 772 (2d Cir. 1994) (quoting *Kadar Corp. v. Milbury*, 549 F.2d 230, 233 (1st Cir. 1977)). And although Courts also must normally construe pro se complaints liberally, *Lerman v. Bd. of Elections in City of New York*, 232 F.3d 135, 140 (2d Cir. 2000), practicing attorneys who choose to represent themselves cannot claim the special considerations normally afforded to pro se litigants. *Harbulak v. Suffolk County*, 654 F.2d 194, 198 (2d Cir. 1981).

IV. The Relevant Statute of Limitations Bars Some, but not All of Levine's Claims.

The Defendants' first, and threshold, argument is that Levine's entire lawsuit is time-barred under the three-year statute of limitations that governs Section 1983 claims brought in New York. Levine argues in response that "[n]o time limit is set in the federal statute," that "[t]his is not a negligence or tort case where the three year limit might apply," and that there is no statute of limitations covering declaratory judgments or claims for damages.

Alternatively, Levine argues that even if a three-year statute of limitations applies, his "second application of June of 2001 was a continued act," [emphasis removed] and "the last act of defendants in denying Plaintiffs application took place on December 12, 2001." Although at least some of Levine's specific claims are time-barred, his final point saves this lawsuit from dismissal in its entirety.

A. A three-year statute of limitations applies to Section 1983 claims brought in New York.

It is well-established and "beyond the cavil" that in New York, Section 1983 actions must be filed within three years of the date on which the plaintiff becomes aware of an alleged injury. *See Pinaud v. County of Suffolk*, 52 F.3d 1139, 1156 (2d Cir.1995), *and Auletta v. Tully*, 576 F. Supp. 191, 195 (N.D.N.Y. 1983). The three-year limitations period applies regardless of whether the Plaintiff seeks legal, equitable, or declaratory relief. *See Hartnett v. New York City Transit Auth.*, 612 N.Y.S.2d 613, 616 (App. Div. 1994). Levine's arguments to the contrary are meritless, and, unsurprisingly, he cites no authority to support them.

B. The continuing violation doctrine does not apply to Levine's claims.

To the extent that Levine's briefing suggests that a "continuing violation" exception applies to his claims, he falls short on this citation-free argument as well. The continuing violation doctrine "allows a plaintiff in certain circumstances to recover on the basis of an ongoing policy or practice of illegal activity initiated prior to the limitations period." *Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 118 (2d Cir. 1997). Under the doctrine, "each continuation or repetition of the wrongful conduct may be regarded as a separate cause of action for which suit must be brought within the period beginning with its occurrence," *id.* at 119 (quotation omitted), but the plaintiff may recover for injuries sustained before the limitations period as well. *Acha v. Beane*, 570 F.2d 57, 65 (2d Cir. 1978). However, the doctrine cannot be applied "merely because the claimant continues to feel the effects of a time-barred discriminatory act." *Harris v. City of New York*, 186 F.3d 243, 250 (2d Cir.1999).

The continuing violation doctrine is heavily disfavored in the Second Circuit. *See Falinski v. Kuntz*, 38 F. Supp.2d 250, 257 (S.D.N.Y.1999) ("The courts of this Circuit have generally been loath to invoke the continuing violation doctrine and will apply it only upon a showing of 'compelling circumstances.' ") (internal citation omitted). In employment discrimination cases, the Supreme Court has stated that "discrete discriminatory acts" are not covered by the continuing violation doctrine, and "are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). Refusals to hire are

considered discrete acts, *id.* at 114, and the continuing violation doctrine is generally inapplicable in discriminatory hiring cases. *See Purdy v. Town of Greenburgh,* 166 F. Supp.2d 850, 863 (S.D.N.Y. 2001); and *Wilkins v. New York City Dep't of Prob.*, 2001 WL 262601 (S.D.N.Y. 2001) (internal citations omitted). The rationale behind the "discrete act" rule is that when a plaintiff is harmed by a discrete act or event, he should be aware of it; "[t]o permit him to wait and toll the running of the statute simply by asserting that a series of separate wrongs were committed pursuant to a conspiracy would be to enable him to defeat the purpose of the time-bar, which is to preclude the resuscitation of stale claims." *Singleton v. City of New York*, 632 F.2d 185, 192 (2d Cir. 1980).

Under this precedent and reasoning, the circumstances of the present case do not support application of the continuing violation doctrine. First, although Levine has alleged unconstitutional acts by the Defendants, and an unconstitutional statutory scheme in general, nowhere does he allege that he was the victim of an ongoing "policy" or "practice." More importantly, Levine had ample notice and opportunity to bring a timely claim following the first denial of his application to be a judicial hearing officer - a denial that, based on everything that Levine has alleged in this case, he must have suspected was discriminatory or retaliatory even at the time that it occurred. In sum, there is no reason to invoke the continuing violation doctrine to save Levine's claims arising out of that first application.

C. Levine's complaint adequately alleges that constitutional violations occurred within the applicable three-year period.

As previously mentioned, Levine re-applied for a judicial hearing officer position in June 2001, and received notice that his application was denied in December 2001 - both dates well within the three-year statute of limitations that has already been determined to apply here. According to the Defendants, Levine's complaint "alleges only that [his second rejection] violated Part 122 of the Rules of the Chief Administrator, which provides for [an] interview; plaintiff does not assert that it violated any constitutional right or federal law." Therefore, argue the Defendants, Levine's complaint does not allege any constitutional violations whatsoever within the statutory limitations period, and should be dismissed in its entirety. This argument must fail, however, in light of the rule that complaints, particularly complaints alleging civil rights violations, must be read liberally at the dismissal stage, with all reasonable inferences drawn in favor of the plaintiff. *See* Part III, *supra*.

Levine mentions his second rejected application in the context of his first cause of action, which seeks to declare New York's judicial hearing officer appointment scheme unconstitutional. And Levine's exact words are that, when it addressed his second application, "[t]he Judicial Hearing Officer Selection Advisory Committee for Queens County failed *to even* provide Plaintiff Levine with an interview or hearing." [Emphasis added.] The words "to even" strongly suggest an incorporation of Levine's prior arguments as to the unconstitutionality of the law, both generally, and as it was applied to him. Viewed under the Rule 12(b)(6) standard, and with a healthy dose of common sense,

Levine's complaint can only fairly be read as claiming that the Defendants' rejection of his second application to be a judicial hearing officer was at least as unconstitutional as their rejection of Levine's first such application. Accordingly, Levine's complaint is not time-barred insofar as it alleges that the rejection of his December 2001 application was unconstitutional.

D. The untimely acts alleged by Levine will be considered as evidence supporting his timely claims.

A statute of limitations does not generally bar the introduction of evidence that predates the commencement of the limitations period but is relevant to events during that period. *Fitzgerald v. Henderson*, 251 F.3d 345, 365 (2d Cir. 2001). Thus, in the employment discrimination realm, where untimely discrete acts of discrimination are alleged in conjunction with timely discrete acts of discrimination, the plaintiff may generally introduce the otherwise time-barred acts as evidence in support of his timely claims. *See, e.g., Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). Therefore, although many of the purportedly unlawful acts of discrimination alleged by Levine fall outside of the statutory limitations period, they provide relevant background information, and will be given evidentiary weight in considering the validity of Levine's timely claims.

V. Levine Has Failed to State a Cognizable "Privileges and Immunities," Due Process, or Equal Protection Claim.

Levine argues that New York's statutory scheme violates the due process, equal protection, and

"privileges and immunities" provisions of the U.S. Constitution. This argument fails on every count.

A. Any constitutional claims regarding New York's mandatory judicial retirement law are time-barred, and will not be considered.

As an initial matter, Levine's complaint and briefings seem to conflate two different laws: New York's constitutional provision that mandates that a judge must retire at the end of the calendar year in which he turns seventy years old, and the statutory and regulatory system by which former or retired judges may be appointed as judicial hearing officers.

To the extent that Levine is seeking to overturn the constitutional retirement provision in this action, he cannot. Section 1983's limitation period applies to "facial" or "as enacted" constitutional challenges to state law, just as it does to other civil rights claims. *See Hacienda Valley Mobile Estates v. City of Morgan Hill,* 353 F.3d 651, 654-55 (9th Cir. 2003); *see also Gilbert v. City of Cambridge,* 745 F. Supp. 42, 47-49 (D. Mass. 1990) (rejecting argument that claims seeking declaratory judgments and challenging constitutionality of laws are not subject to statutory limitations periods). Because more than three years have elapsed since Levine was forced to retire under New York's constitutional provision on December 31, 1999, he can no longer challenge the constitutionality of that provision. Levine's complaint will instead be read as challenging only the statutory and regulatory scheme for appointing judicial hearing officers.

B. Levine Cannot Assert a Due Process Claim.

Levine's complaint states that the statutory scheme for appointment of judicial hearing officers violates his due process rights.2 The Due Process Clause imposes procedural safeguards on governmental decisions that deprive individuals of liberty or property interests, within the meaning of the Fifth or Fourteenth Amendments. *See Mathews v. Eldridge,* 424 U.S. 319, 332 (1976). Thus, to prevail on a procedural due process claim under the Fifth and Fourteenth Amendments, a plaintiff must necessarily demonstrate that he was deprived of a protected property or liberty interest. *Green v. Bauvi,* 46 F.3d 189, 194 (2d Cir. 1995). Levine claims that he was deprived of both types of interest, but can demonstrate neither.

1. Levine had no property interest in a future judicial hearing officer position.

Levine insists that he had a property right to continue serving as a judge. The Defendants are equally insistent that he had none. Levine is clearly mistaken.

"Although the Constitution protects property interests, it does not create them." *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.,* 96 F.3d 623, 629 (2d Cir.1996), *cert. denied,* 519 U.S. 1150 (1997). Rather,

---

2 Levine does not specify whether New York's statutory scheme offends substantive due process or procedural due process. However, his claims and supporting submissions clearly sound in the latter, and will be analyzed as such. Even had Levine adequately raised and argued a substantive due process claim, it seems highly dubious that he would be capable of demonstrating the "fundamental liberty interest" or "conscience-shocking" governmental behavior required to support such a claim. *See County of Sacramento v. Lewis,* 523 U.S. 833, 846-50 (1998), *and Chavez v. Martinez,* 538 U.S. 760, 775-76 (2003).

property interests are created and defined by rules or understandings in sources such as state law, which "secure certain benefits and that support claims of entitlement to those benefits." *Id.* (internal quotation omitted). The Supreme Court has explained that property rights "protect those claims upon which people rely in their daily lives." *Bd. of Regents of State Coils. v. Roth,* 408 U.S. 564, 577 (1972). Thus, to have a property or liberty interest protected by due process, a plaintiff must have more than a "unilateral expectation" of some future benefit; he must have a "legitimate claim of entitlement" to that benefit. *Id.*

In the employment realm, there is generally no property interest in the mere expectation of future employment. *See Roitman v. New York City Transit Auth.,* 704 F. Supp. 346, 349 (E.D.N.Y.1989). An applicant's prior years of service or employment in different positions do not "carry over" to create a legitimate expectation to some other related position. *See Donato v. Plainview-Old Bethpage Centr. Sch. Dist.,* 96 F.3d 623, 629 (2d Cir.1996). And where, as here, the obtainment of an employment position hinges on others' discretion, the applicant has no legitimate claim of entitlement to that position, *see Donato,* 96 F.3d at 629, unless the discretion is so restricted as to "virtually assure conferral of the benefit." *See Berheim v. Litt,* 79 F.3d 318, 323 (2d Cir. 1996). In a similar case dealing with the appointment of New York City Family Court judges, the Second Circuit stated that "the fact that many, or even most, incumbent judges have been reappointed cannot operate to raise [the plaintiffs] `subjective expectation' to a constitutionally protected right, especially when doing so would contradict the relevant statutes and rules." *Schwartz v. Mayor's*

Committee on the Judiciary of the City of New York, 816 F.2d 54, 57 (2d Cir. 1987).

In this case, New York's scheme for appointing judicial hearing officers clearly and unmistakably gives the chief administrator of the courts extensive discretion to both confer with others on each judicial hearing officer applicant's qualifications, and to make the ultimate determination as to which applicants should be selected for the position. And the relevant rules and regulations concerning the appointment scheme specifically and explicitly state that "[n]othing herein shall vest any person with any right to be designated as a judicial hearing officer." 22 NYCRR § 122.7. In sum, Levine's assertion that he had a constitutionally protected property right to be selected as a judicial hearing officer is baseless.

2. Levine had no liberty interest in a future judicial hearing officer position.

Levine argues without elaboration that "[l]iberty interests are also involved" in this case. As an initial matter, it is highly doubtful that this single-sentence assertion, unsupported by any legal authority, suffices to adequately raise the issue of Levine's liberty interest in a judicial hearing officer appointment. Even assuming that it does, this argument is without merit.

"A governmental employee's constitutionally protected liberty interest is implicated when the government, in terminating the employee, imposes upon the employee a stigma which restricts his or her ability to obtain future employment." *McCullough v. Wyandanch Union Free Sch. Dist.*, 187 F.3d 272, 280 (2d Cir. 1999). In such liberty interest-in-employment claims, the plaintiff must demonstrate some allegedly stigmatizing allegations that were, or are likely to be,

disclosed. *Id.* at 280-81. As this language suggests, liberty interests in future employment are generally implicated by terminations, not refusals to hire. Levine offers no precedent, and none was found, for his implicit contention that the mere refusal to hire him amounted to a stigmatizing restriction on his ability to obtain other employment. New York precedent specifically counsels otherwise. *See Matter of Marro v. Bartlett,* 389 N.E.2d 808, 813 (N.Y. 1979) (finding "no substance to the assertion that `stigma' attaches to the denial of certification [as a judicial hearing officer], at least in the absence of any public disclosure of the reasons therefor.)3 And Levine's complaint is entirely barren of any suggest that the Defendants have somehow otherwise stigmatized him, or that they are likely to do so in the future. Accordingly, Levine has failed to state a cognizable claim that he was deprived of a liberty interest without procedural due process.

C. Levine has not stated a cognizable federal claim for the deprivation of his "privileges and immunities."

Levine's complaint also argues that the New York scheme for appointment of judicial hearing officers, or its application to him, deprived him of "rights, privileges, and immunities secured by the Constitution and laws of the United States and New York State." Even assuming that Levine actually had, as he suggests, some privilege to employment as a

---

3 As explained in Part V.D.1, *infra*, although the New York Court of Appeals' logic and determinations are not binding upon this Court, they are highly persuasive in regard to questions of New York law.

judicial hearing officer, any claim for the deprivation of this privilege is not cognizable under federal law.

The Fourteenth Amendment states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In the *Slaughter-House Cases,* 83 U.S. 36 (1872), the Supreme Court noted: "It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out." *Id.* at 74. Accordingly, the Supreme Court held that only the enumerated privileges and immunities of federal citizenship, not state citizenship, are protected by this portion of the Fourteenth Amendment. *Id.* at 75. Those federal privileges and immunities are: (1) the right to pass freely from state to state; (2) the right to petition Congress for redress of grievances; (3) the right to vote for national officers; (4) the right to be protected against violence while in the lawful custody of a U.S. Marshall; (5) the right to enter public lands; (6) the right to inform U.S. officers of violations of its laws; (7) the right to carry on interstate commerce; (8) the statutory right to take and hold real property. *See* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 7-4, at 423 (1978).

As previously noted (in Part V.B.1, *supra),* property rights are generally created by state law, not the federal Constitution. Property rights have thus not been protected under the "privileges and immunities" clause of the latter; since the *Slaughter-House Cases,* constitutional employment claims have been brought pursuant to other provisions of the
Fourteenth Amendment (some already discussed above), but not the "privileges and immunities" clause.

Cf. Prudential Ins. Co. of Am. v. Cheek, 259 U.S. 530, 539 (1922). Levine offers no reason, nor is any apparent, for contravening well over a century of Supreme Court precedent.

D. Levine Has Failed to State an Equal Protection Claim.

The Equal Protection Clause of the Fourteenth Amendment guarantees the right to be free from "invidious discrimination in statutory classifications and other governmental activity." *Bernheim v. Litt,* 79 F.3d 318, 323 (2d Cir. 1996) (quoting *Harris v. McRae,* 448 U.S. 297, 322 (1980)). That is, the government may not "draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective," or "subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose." *Lehr v. Robertson,* 463 U.S. 248, 265-66 (1983). There are two main types of equal protection challenges: to laws that disparately affect classes of persons, and to the disparate enforcement of laws against individuals. Levine falls short of stating either type.

1. New York's scheme for appointing judicial hearing officers, as enacted, does not violate the Constitution's Equal Protection guarantees.

In traditional equal protection claims, the plaintiff challenges a law that results in the disparate treatment of a class of persons of whom the plaintiff is a member, or a law explicitly treating that class differently.4 Legislation that "disadvantages a `suspect'

---

4 Levine does not actually specify what "class" is burdened by the judicial hearing officer appointment scheme. Read in conjunction

class" or "impinges on the exercise of fundamental personal right," will be strictly scrutinized to determine whether it is "precisely tailored to serve a compelling governmental interest." *Eisenbud v. Suffolk County*, 841 F.2d 42, 45 (2d Cir. 1988) (internal quotations and citations omitted). "[Social and economic legislation that does not discriminate on the basis of inherently suspect classifications or implicate `fundamental' personal rights does not violate equal protection rights if it has any rational relationship to a legitimate governmental purpose." *Id.*

As an initial matter, the basis of Levine's "as enacted" challenge to the judicial hearing officer appointment scheme is not clear from his submissions. To the extent that Levine is arguing that New York's system should be subject to strict scrutiny, his argument must fail. As already explained in Part V.B, the system does impinge on any property or liberty interests, and Levine's submissions do not suggest any other fundamental personal right implicated by the scheme. Additionally, to the extent that Levine suggests that the law must be strictly scrutinized because it discriminates based on age or disability, he is mistaken. Age is not a suspect classification under the Equal Protection Clause. *See Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62, 83 (2000). Persons with physical or mental

---

with his arguments that the New York constitution's mandatory judicial retirement provision is unconstitutional, it may be presumed that Levine is arguing that the aged or disabled are burdened; alternatively, he may be simply proposing a class that consists of forcibly retired former state judges who apply to be judicial hearing officers. Either way, the New York scheme passes constitutional muster, as explained *infra*.

disabilities are not a suspect class. *See Story v. Green,* 978 F.2d 60, 64 (2d Cir. 1992). And government employees subjected to a mandatory retirement age are not a suspect class. *See Mass. Bd. Of Retirement v. Murgia,* 427 U.S. 307, 313 (1976). No other suspect classification can be inferred from Levine's submissions.

Since no suspect classification or fundamental interest is implicated by New York's scheme, the next question is whether it is rationally related to furthering a legitimate governmental objective. It is self-evident, and undisputed by Levine, that the selection of qualified individuals to serve as judicial hearing officers is a legitimate governmental objective. The key question is whether the New York system for selecting qualified individuals is rationally related to the legitimate objective of having such qualified individuals serve. Levine argues, in essence, that there is no adequately rational relationship. Specifically, Levine seems to suggest that the discretion that the rules place in the hands of the chief
administrative judge and his assistants to select judicial hearing officers without offering any public justification for their decision, bears no rational relation to the state's objective of appointing qualified officers.

The review of legislation for some rational basis is "highly deferential," does not pass judgment upon the "wisdom, fairness, or logic" of legislative decisions, and mandates upholding statutes if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Dittmer v. County of Suffolk,* 188 F. Supp.2d 286, 292 (E.D.N.Y. 2002) (citing Weinstein v. Albright, 261 F.3d 127, 140 (2d Cir.2001) (internal citations omitted)).

The New York Court of Appeals has previously stated that the judicial appointment scheme "makes

eminent theoretical and practical common sense." *Matter of Marro v. Bartlett*, 389 N.E.2d 808, 812 (N.Y. 1979). As the Court of Appeals explained, the "determination whether the services of any individual former Judge are necessary to meet a need for additional judicial manpower must always involve the weighing what must be personal if not private considerations." *Id.* at 812-13. "It would serve no sufficiently useful purpose... to expose to public scrutiny the potentially sensitive and delicate personnel considerations which must be evaluated and resolved." *Id.* at 813. "Indeed," noted the Court, "many of the same considerations of policy and practice which shelter the procedures preliminary to higher executive personnel appointments, e.g., by the Governor, from public view and judicial scrutiny support the present method for certification of former Judges for further judicial service." *Id.*

Levine concedes that prior decisions by the New York Court of Appeals and Appellate Division have upheld the federal constitutionality of New York's mandatory judicial retirement rule (which, again, is not considered here see Part V.A, *supra),* and New York's scheme of appointing judicial hearing officers. But Levine "respectfully disagrees" with the state courts' conclusions. A federal court should not give effect to state statutes that violate the federal Constitution, and is not bound by state court applications of federal constitutional principles to state law. *Indus. Consultants, Inc. v. H. S. Equities, Inc.*, 646 F.2d 746, 749 (2d Cir. 1981). But state court determinations are generally considered persuasive authority, and are entitled to great respect, particularly where they depend "in large part" upon the state court's "intimate

knowledge of the operation" of the state statute at issue. *Id.* The persuasive reasoning of the New York Court of Appeals, considered in light of the highly deferential "rational basis" standard appropriate in this case, is sufficient to defeat any challenge to the constitutionality of the New York scheme, as enacted.

2. Levine has failed to state a "selective enforcement" or "class of one" equal protection claim.

Where a plaintiff alleges that the application of a facially valid law or regulation violates equal protection in its application to him as an individual, he must generally state a claim sounding in "selective enforcement," or discrimination against a "class of one." Under either form of equal protection claim, the plaintiff must allege that the defendants intentionally treated him differently than other similarly-situated individuals. *See Payne v. Huntington Union Free Sch. Dist.*, 219 F. Supp.2d 273, 278 (E.D.N.Y. 2002). Whether a plaintiff and others are similarly situated is generally a factual issue, resolved by an objective examination of whether "a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated." *Equus Assocs., Ltd. v. Town of Southampton,* 37 F. Supp.2d 582, 598 (E.D.N.Y. 1999) (quoting *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 19 (1st Cir. 1989)). In the present case, Levine's individualized equal protection claim fails because he does not point to any other individual similarly situated to him, but more favorably treated by the defendants.

3. Levine's retaliation claim is not cognizable under equal protection.

Levine's complaint and memorandum opposing dismissal stress that he has been the victim of political retaliation at the hands of the Defendants. However, the Second Circuit has strongly intimated that equal protection is an improper vehicle for employment-related retaliation claims; such claims are more appropriately brought under the rubric of Title VII or the First Amendment. *See Bernheim v. Litt*, 79 F.3d 318, 323 (2d Cir. 1996) (citing *Ratliff v. DeKalb County*, 62 F.3d 338, 340-41 (11th Cir. 1995) (no clearly recognized right to be free from retaliation exists under equal protection clause); *and Gray v. Lacke*, 885 F.2d 399, 414 (7th Cir. 1989) (claims for retaliation must be brought under Title VII, not equal protection clause), *cert. denied*, 494 U.S. 1029 (1990)). A plaintiff cannot restyle a Section 1983 claim for retaliation as a violation of his Equal Protection rights under the Fourteenth Amendment. *Knight v. City of New York*, 303 F. Supp.2d 485, 501 (S.D.N.Y. 2004). Levine has failed to adequately plead or argue either a First Amendment or a Title VII retaliation cause of action, and his retaliation claims will not be analyzed under the equal protection clause.

VI. Conclusion: Dismissal of Levine's Entire Case Is Appropriate; Levine May Move to Amend His Complaint.

Because Levine's pleadings fail to state a timely and viable federal cause of action, and because this Court declines to exercise supplemental jurisdiction over any potential remaining state law claims that Levine purports to plead,5 dismissal of Levine's entire case is appropriate.

---

5 Levine's complaint seeks, without elaboration, a declaration that "he has been deprived of rights, privileges and immunities secured

Levine has indicated that he seeks to amend his complaint. Under Federal Rule of Civil Procedure 15(a), leave to amend a complaint, even following dismissal, is generally "freely given." Accordingly, Levine may move to amend his complaint, so long as his proposed amendments are not "futile." *See John Hancock Mutual Life Ins. Co. v. Amerford Int'l Corp.*, 22 F.3d 458, 462 (2d Cir.1994); *and 3* JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 15.10 (2d ed. 1989).

If Levine desires to move to amend his complaint, he must submit a letter to the Court stating so (with copies served upon all other parties' counsel), on or before March 31, 2005. If Levine fails to submit and serve such a letter by that date, this case will be terminated with prejudice.

SO ORDERED.

Dated: Central Islip, New York
February 23, 2005

/s/
Denis R. Hurley
United States District Judge

---

by the Constitution and laws of the United States and New York State." The decision whether to exercise supplemental jurisdiction is left to the discretion of the district court. *Ametex Fabrics, Inc. v. Just In Materials, Inc.*, 140 F.3d 101, 105 (2d Cir. 1998). Under 28 U.S.C. § 1367(c), a district courts may decline to exercise supplemental jurisdiction over a state law claim when the district court has dismissed all of the federal claims over which it has original jurisdiction. Thus in this case, even assuming that Levine has sufficiently stated any cognizable state law claims (a very generous assumption), supplemental jurisdiction over such claims is hereby declined.

APPENDIX F

MEMORANDUM AND ORDER
(Filed September 19, 2006)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

SAMUEL M. LEVINE,

Plaintiff,

-against-

EDWARD F. Mc CABE, and
JONATHAN LIPPMAN,

Defendants.

----------X

03-CV-6420 (DRH) (ETB)
MEMORANDUM & ORDER

APPEARANCES:

SAMUEL LEVINE
Plaintiff Pro Se
711 Shore Road (2-E)
Long Beach, New York 11561

OFFICE OF COURT ADMINISTRATION FOR THE STATE OF NEW YORK
Attorneys for Defendants
Agency Building 4, 20th floor
Empire State *Plaza*
Albany, NY 12223
By: John Joseph Sullivan, Esq.

OFFICE OF THE ATTORNEY GENERAL OF NEW YORK
Attorneys for Defendants
300 Motor Parkway
Hauppauge, New York 11788
By: Susan M. Connolly, Esq.

HURLEY, Senior District Judge:

Introduction

Plaintiff Samuel Levine, a retired Nassau County district judge, has brought the present suit against Defendants Jonathan Lippman, Chief Administrative Judge for the New York State Unified Court System, and Edward G. McCabe, the Administrative Judge of the courts of Nassau County. Levine alleges that Defendants' refusal to appoint him "judicial hearing officer," violated the First Amendment and Title VII. Defendants now move to dismiss Levine's Amended Complaint pursuant to Federal Rule of Civil Procedure ("Rule") 12(b) (6) for failure to state a claim. Levine opposed the motion and brought a cross-motion to submit a Second Amended Complaint. For the reasons that follow, Defendants' motion is GRANTED in part and DENIED in part and Levine's motion to amend is DENIED.

Background

The following summary of the facts is drawn from the Court's February 23, 2005 Memorandum and Order, and the most recent submissions by the parties. According to Levine's complaint and the documents attached thereto, Levine has been a practicing attorney

in New York since 1950. He has been described as a "gadfly" *and a* champion of "seemingly hopeless causes." In 1996 he was elected to a term as a Nassau County district court judge for the county's "First District," and as such, apparently automatically became the "President of the Board of Judges" or the "presiding judge" of the Nassau County district courts. The New York Times described Levine as "a perennial Democratic also-ran in predominantly Republican Nassau county," and his election was apparently something of an upset. Levine states that as presiding judge of the Nassau County district courts, he was supposed to be "in charge of the daily operation and administration of the District Court subject to the control and reporting to Defendant McCabe." But according to Levine, McCabe, as a Republican, maneuvered to keep all power and authority in his own hands. Levine also insists that McCabe "ignored and failed to act on many serious problems in the District Court set forth [in] Levine['s] reports and recommendations," and made efforts to prevent Levine from presiding over a politically - charged case. McCabe's motives, insists Levine, were "political retaliation and prejudice" against him.

On December 31, 1999, having apparently reached the age of 70, Levine retired pursuant to the New York Constitution's mandatory judicial retirement provision.6 Shortly prior to his retirement, Levine applied to be designated as a judicial hearing officer, pursuant to the provisions of the New York Judiciary

---

6 The New York Constitution, Article VI, § 25, subdivision b states in relevant part: "Each ... judge of the district court shall retire on the last day of December in the year in which he or she reaches the age of seventy."

Law. According to Levine, he satisfied the statutory and regulatory requirements, in that he was "well qualified" to be a judicial hearing officer, and his application included an "extraordinary array of supporting documentation" to prove it.

On January 26, 2000, Levine was interviewed by the judicial hearing officer selection advisory committee appointed by Lippman for Nassau County. Levine believes that the committee received and reviewed a report from McCabe recommending that his application be denied, and that the committee recommended the same. In a letter dated March 9, 2000, Lippman informed Levine that his application had been denied. Levine's immediate request for reconsideration of that decision was denied in a subsequent letter from Lippman, dated March 30, 2000. Levine asserts that he was "denied the right and opportunity to receive a copy of [McCabe's] negative report and recommendations," that the Defendants "failed to submit or serve [him with] any written charges or complaints concerning his conduct or services or other facts impacting on the questions of competence, work ethic, experience or judicial temperament," and that he was "denied notice of any such charges or complaints."

On June 30, 2001, Levine submitted a new application to be a judicial hearing officer, this time in Queens County. This application was denied as well, but without any further interview or hearing.

On December 23, 2003, Levine filed the present suit pursuant to 42 U.S.C. § 1983, seeking a declaratory judgment that New York's statutory scheme for appointment of judicial hearing officers is unconstitutional, a declaratory judgment that the Defendants violated various types of his civil rights, as well as $1,200,000 in money damages and $300,000 in

costs and fees from Defendants. Defendants moved to dismiss the suit, on the grounds that Levine's Complaint brought claims barred by the applicable statute of limitations, and because Levine had failed to state equal protection and due process claims.

In a February 23, 2005 Memorandum and Order, this Court dismissed, as time-barred, all claims relating to the denial of Levine's first application. The Court similarly dismissed all of Levine's claims asserting equal protection and due process violations. The Court thus dismissed the Complaint in its entirety, but nevertheless granted Levine leave to amend his Complaint because the allegations regarding his second application were not barred by the statute of limitations. *(See* Feb. 23, 2005 Mem. & Order, at 12.) The Court granted leave to submit an amended complaint with respect to Levine's claim that his second application for appointment as a judicial hearing officer was denied as a result of political retaliation. The Court noted that an employment retaliation claim cannot be raised under the Equal Protection Clause, although it may properly be brought pursuant to the First Amendment or Title VII. *(Id.* at 24.)

Thereafter, Defendant submitted an Amended Complaint, alleging that the denial of his application for appointment as a judicial hearing officer violated his civil rights pursuant to 42 U.S.C. § 1983 and Title VII, 42 U.S.C. § 2000e, *et seq.* Defendants now move to dismiss the Amended Complaint, again for failure to state a claim pursuant to Rule 12(b)(6). Levine opposes the motion in his "Memorandum of Law for Second Amended Complaint," which poses arguments both in opposition to Defendants' motion and in support of his motion to submit a Second Amended Complaint. Defendants submitted a letter-brief dated May 16,

2006, in reply to Levine's submissions.

Discussion

I. Motion to Dismiss

In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court must limit itself to the facts stated in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint. *Hayden v. County of Nassau,* 180 F.3d 42, 54 (2d Cir. *1999).* The court must accept the factual allegations contained in the complaint as true, and view the pleadings in the light most favorable to the nonmoving party, drawing all reasonable inferences in his favor. *Cleveland v. Caplaw Enters.,* 448 F.3d 518, 521 (2d Cir. 2006). Dismissal under Rule 12(b) (6) is appropriate only if it appears beyond doubt that a plaintiff can prove no set of facts entitling him to relief in support of his claim. *Zerilli-Edelglass v. New York City Transit Auth.,* 333 F.3d 74, 79 (2d Cir. 2003). The issue is not how likely the plaintiff is to ultimately prevail, but whether he is entitled to even offer evidence to support his claims. "Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test." *Weisman v. LeLandais,* 532 F.2d 308, 311 (2d Cir. 1976) (per curium) (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974)). These standards apply with particular strictness where, as here, the complaint alleges civil rights violations. *Cleveland v. Caplaw Enters.,* 448 F.3d at 521.

Nevertheless, although a court must accept the facts alleged in the non-movant's complaint, "conclusory allegations of the legal status of the defendants' acts

need not be accepted as true for the purposes of ruling on a motion to dismiss." *In re Am. Exp. Co. Shareholder Litig.*, 39 F.3d 395, 400 n.3 (2d Cir. 1994). "[C]ourts do `not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened.' "First *Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763,
772 (2d Cir. 1994) (quoting *Kadar Corp. v. Milbury*, 549 F.2d 230, 233 (1st Cir. 1977)). And although Courts also must normally construe pro se complaints liberally, *Lerman v. Bd. Of Elections in City of New York*, 232 F.3d 135, 140 (2d Cir. 2000), practicing attorneys who choose to represent themselves cannot claim the special considerations normally afforded to pro se litigants. *Harhulak v. Suffolk County*, 654 F.2d 194, 198 (2d Cir. 1981).

A. Statute of Limitations

Defendants argue that Levine's first cause of action, a § 1983 claim, is time-barred under the three-year statute of limitations that governs § 1983 claims brought in New York. Levine's counter is two-fold: (1) "Levine submits that the violations of the constitution ... far transcend and are of greater importance and priority than the personal injury action with a three-year limitation"; and (2) "The three-year rule should not apply when the acts complained of are continuous acts." (Pl.'s Mem. of Law for 2d Am. Compl. ¶ 21.) The first argument is unelaborated, unsupported by any citation, and at odds with years of well-established case law. *See, e.g., Owens v. Okure*, 488 U.S. 235, 250-51 (1989); *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1156 (2d Cir. 1995). The second argument, addressed in the first

opinion, will be addressed again herein. *(See* Feb. 23, 2005 Mem. & Order at 9-10.)

It is well-established and "beyond the cavil" that in New York, § 1983 actions must be filed within three years of the date on which the plaintiff becomes aware of an alleged injury. *See Pinaud,* 52 F.3d at 1156. In the Feb. 23, 2005 Order, the Court addressed Defendants argument that "Levine's complaint does not allege any constitutional violations whatsoever within the statutory limitations period, and should be dismissed in its entirety." *(See* Feb. 23, 2005 Order at 11.) The Court disagreed with Defendants on this point, however, noting that "in light of the rule that complaints, particularly complaints alleging civil rights violations, must be read liberally at the dismissal stage, with all reasonable inferences drawn in favor of the plaintiff." (Id.) Because Levine had filed his complaint in December 23, 2003, the Court ruled that "Levine's complaint is not time-barred insofar as it alleges that the rejection of his December
2001 application was unconstitutional," because that event occurred with the three-year statute of limitations period.

On the present motion, Defendants renew their statute of limitations argument. Defendants assert that the December 2001 denial of the second application is not the relevant discriminatory act; rather it is merely an effect of the act. Defendants argue that "[w]hat plaintiff is actually asserting as the unconstitutional retaliatory act is not the denial of his second application by Judge Lippman in 2001, but the negative recommendation made by Judge McCabe sometime between October, *1999,* and March, 2000, when plaintiff's first application was made and denied." (Defs.' Mem. at 7.) Pursuant to the three-year

limitation, any claim accruing occurring prior to December 23, 2000, would be time-barred. If the last alleged discriminatory act was in March 2000, then those acts would be barred. Levine does not offer a response to these arguments.

In the Amended Complaint, Levine alleged, "Upon information and belief, Defendant LIPPMAN DENIED this 2001 application based on the *1999* report and recommendation of Defendant McCABE." (Am. Compl. ¶ 19.) The allegation is that the denial of the 2001 application by Defendant Lippman is an allegedly discriminatory act. There is no suggestion that Defendant Lippman was duty-bound to deny the application based upon the *1999* report and recommendation. Therefore, the denial of the 2001 application is alleged to be a discriminatory act, in itself, rather than a mere effect of the "actual" discriminatory act in *1999*. Consequently, Defendants motion to dismiss the claim on statute of limitation grounds, as it applies to Defendant Lippman, is denied.

A question remains regarding the retaliation claim as it pertains to Defendant McCabe. The alleged retaliatory act was the *1999* report and recommendation. That act occurred some five years before the filing of the present suit and is time-barred. There is a relevant modification to the time-limitation on § 1983 claims, however: the "continuing violation" doctrine, which "allows a plaintiff in certain circumstances to recover on the basis of an ongoing policy or practice of illegal activity initiated prior to the limitations period." *Pot/is v. New Sch. for Soc. Research*, 132 F.3d 115, 118 (2d Cir. 1997). Under the doctrine, "each continuation or repetition of the wrongful conduct may be regarded as a separate cause

of action for which suit must be brought within the period beginning with its occurrence," *id.* at 119 (quotation omitted), but the plaintiff may recover for injuries sustained before the limitations period as well. *Acha v. Beame,* 570 F.2d 57, 65 (2d Cir. 1978). However, the doctrine cannot be applied "merely because the claimant continues to feel the effects of a time-barred discriminatory act." *Harris v. City of New York,* 186 F.3d 243, 250 (2d Cir. *1999).*

The continuing violation doctrine is heavily disfavored in the Second Circuit. *See Falinski v. Kuntz,* 38 F. Supp.2d 250, 257 (S.D.N.Y. *1999)* ("The courts of this Circuit have generally been loath to invoke the continuing violation doctrine and will apply it only upon a showing of `compelling circumstances.' ") (internal citation omitted). In employment discrimination cases, the Supreme Court has stated that "discrete discriminatory acts" are not
covered by the continuing violation doctrine, and "are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 113 (2002). Refusals to hire are considered discrete acts, *id.* at 114, and the continuing violation doctrine is generally inapplicable in discriminatory hiring cases. *See Purdy v. Town of Greenburgh,* 166 F. Supp.2d 850, 863 (S.D.N.Y. 2001); and *Wilkins v. New York City Dep't of Prob.,* 2001 WL 262601 (S.D.N.Y. 2001) (internal citations omitted). The rationale behind the "discrete act" rule is that when a plaintiff is harmed by a discrete act or event, he should be aware of it; "[t]o permit him to wait and toll the running of the statute simply by asserting that a series of separate wrongs were committed pursuant to a conspiracy would be to enable

him to defeat the purpose of the time-bar, which is to preclude the resuscitation of stale claims." *Singleton v. City of New York*, 632 F.2d 185, 192 (2d Cir. 1980).

Turning again to the same language in the Amended Complaint, there is no reason to consider the independent act of Defendant Lippman's rejection in 2001 as a mere continuance of the discriminatory act of Defendant McCabe's report and recommendation in *1999*. (*See* Am. Compl. ¶ 18.) According to the Amended Complaint, "The Advisory Committee thereupon followed Defendant McCABE's Recommendation and recommended Denial of the Plaintiff's Judicial Hearing Officer application to Defendant LIPPMAN." (Am. Compl. ¶ 11.)

There is no indication that the *1999* report and recommendation mandated the 2001 denial. Rather, the allegation is that the recommendation was taken into consideration by the Advisory Committee, which made its own, independent recommendation to Defendant Lippman, who in turn made his own independent determination. Even if these recommendations were "routinely rubber-stamp[ed]," the allegedly discriminatory acts were nevertheless discrete. Furthermore, perusing the Amended Complaint, there is no allegation of any specific act committed by Defendant McCabe after the *1999* report and recommendation. As a result, a claim based upon the *1999* report and recommendation is time-barred and the § 1983 claim against Defendant McCabe is hereby dismissed.

In sum, the claim against Defendant Lippman is not time-barred but the claim against Defendant McCabe is. Accordingly, the Court grants the motion to dismiss the claim as to Defendant McCabe, but denies

the motion as to Defendant Lippman.

B. First Amendment Claim

Defendants move to dismiss the first cause of action as it pertains to the First Amendment on the ground that "although it is a general rule that it is constitutionally impermissible to consider political affiliation when making an appointment, judicial officers have been recognized as coming within the ambit of the 'policymaker' exception to that rule." (Defs.' Mem. at 17.) Levine offers little response to this argument, save the conclusory argument that his "conduct of free speech in report on problem in the District Court of Nassau County, was protected by the First Amendment." (Pl.'s Mem. of Law for 2d Am. Compl. ¶ 31.)

Defendants' motion is premised upon the assertion that judicial officers are "policymakers" (Def.'s Mem. at 13 (citing cases)), and, as such, the claim must be dismissed. The Supreme Court has ruled that the First Amendment permits dismissals of policymakers because of their political affiliation, when the employer can establish that party affiliation is an appropriate requirement for the effective performance of the public office involved. *See McEvoy v. Spencer*, 124 F.3d 92, 98 (2d Cir. 1997) (citing *Branti v. Finkel*, 445 U.S. 507, 518 (1980)).

Whether a person is a policymaker is a question of law. *See Gordon v. County of Rockland, 110* F.3d 886, 888-89 (2d Cir. 1997); *Danahy v. Buscaglia*, 134 F.3d 1185, 1191 (2d Cir. 1998). The Second Circuit Court of Appeals has clarified the policymaker inquiry by identifying eight pertinent factors, including:

> whether the employee (1) is exempt from civil

> service protection, (2) has some technical competence or expertise, (3) controls others, (4) is authorized to speak in the name of the policymakers, (5) is perceived as a policymaker by the public, (6) influences government programs, (7) has contact with elected officials, and (8) is responsive to partisan politics and political leaders.

Vezzetti v. Pellegrini, 22 F.3d 483, 486 (2d Cir.1994). On the other hand, these factors are not "an exhaustive list of indicators, nor is any one factor or group of them always dispositive." *Id.* at 486. Moreover, the job description, or what the employee could do, rather than job performance, or what the employee actually does, controls the analysis. *See Regan v. Boogertman*, 984 F.2d 577, 580 (2d Cir.1993) (looking to the town code to determine the powers with which the plaintiff is vested by law); *Savage v. Gorski*, 850 F.2d 64, 66 (2d Cir.1988) (looking to the job description).

The difficulty in determining the validity of Defendants' motion at this juncture is that Defendants fail to discuss any of the above factors. Rather, Defendants rely upon a string of Sixth Circuit opinions that have held that various types of judges are "policymakers." (Defs.' Mem. at 13.) Though Defendants assert that "an Ohio Domestic Relations Court referee [is] a judicial appointee whose power and duties are quite similar to those of a judicial hearing officer" *(Id. at* 15), hoping to reap the benefit of a Sixth Circuit opinion, Defendants have not submitted an Answer that asserts the specific duties of a judicial hearing officer. Similarly, nowhere the in
Amended Complaint does Levine address this issue.

As a result, though the question of whether a judicial hearing officer is a "policymaker" is ultimately

a matter of law, it is still a fact-specific inquiry. And, to that end, the parties have failed to provide the Court with any facts, by way of allegation or proof, that would merit a decision either way. *See Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 242 (1st Cir. 1986) (en banc) ("[The] court's function, it seems to us, is to do what courts are often called upon to do — to weigh all relevant factors and make a common sense judgment in light of the fundamental purpose to be served."), *quoted in Gordon, 110* F.3d at 889 (noting that the policymaker inquiry involves a fact-specific inquiry, which should be distinguished from an issue of fact). Accordingly, Defendants' motion to dismiss the First Amendment claim is denied without prejudice.

C. Title VII Claim

Finally, Defendants move to dismiss the second cause of action, the Title VII claim for three reasons: (1) Levine failed to raise the claim before the Equal Employment Opportunity Commission ("EEOC"); (2) Levine failed to establish a prima facie retaliation claim; and (3) Defendants cannot be individually liable. Because the first argument is dispositive, it is the only one addressed herein.

The presentation of a Title VII claim to the EEOC is not a jurisdictional prerequisite, but only a precondition to bringing a Title VII action that can be waived by the parties or the court. *Francis v. City of New York*, 235 F.3d 763, 768-69 (2d Cir. 2000). Nevertheless, "it remains the case that exhaustion of administrative remedies through the EEOC stands *as an* essential element of Title VII's statutory scheme, and one with which defendants are entitled to insist that plaintiffs comply." *Id.* at 768. In the present case,

there is no indication that Levine filed any charge with the EEOC. There is nothing in the Amended Complaint that mentions an EEOC charge, nor is there any attached copy of said charge. Furthermore, Defendants have not waived the filing requirement. *(See* Defs.' Mem. at 18.) As a result, Levine's Title VII claim must fail, and the Court grants Defendants' motion to dismiss the Title VII claim.

II. Motion for Leave to Amend

Levine has indicated that he seeks to file a Second Amended Complaint ("SAC"), a copy of which he has provided to this Court. It appears that he has not added new claims or new parties, however, but rather simply alleges additional discriminatory acts to support his initial claims.

Under Federal Rule of Civil Procedure 15(a), leave to amend a complaint, even following dismissal, is generally "freely given. Nonetheless, a motion to amend should be denied "if there is an `apparent or declared reason — such as [1] undue delay, [2] bad faith or dilatory motive ... [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of the allowance of the amendment, [or (5)] futility of amendment." *Dluhos v. Floating & Abandoned Vessel, Known as NY,* 162 F.3d 63, 69 (2d Cir. 1998) (quoting *Foman v. Davis,* 371 U.S. 178, 182 (1962)). Although the decision of whether to allow *a party* to amend his complaint is left to the sound discretion of the district court, there must be good reason to deny the motion. *See Acito v. IMCERA Group, Inc.,* 47 F.3d 47, 55 (2d Cir. 1995); *see also S.S. Silberblatt, Inc. v. E. Harlem Pilot Block-Bldg. 1 Hous. Dev. Fund Co.,* 608 F.2d 28,

42 (2d Cir.1979).

The Court need not address all five factors, because it is clear that the proposed amendments would be futile. As stated *supra,* any acts that occurred before December 23, 2000 are time-barred. The proposed SAC makes a series of allegations regarding a retaliatory act that occurred in or around 1996. (SAC ¶¶ 24(a)-(c).) These alleged acts of discrimination are clearly time-barred and amendment would be futile.

The other new material in Levine's proposed SAC appears in a section captioned "Politics and Traffic Court Judicial Hearing Officers." *(Id.* ¶¶ 3 1(a)-(f).) Therein, Levine alleges that he has been deprived of an appointment to the Nassau County Traffic and Parking Violation Agency ("TPVA") since he first applied for the position in January 1, 2000. This deprivation allegedly emanates from the initial act of depriving Levine of the appointment to Judicial
Hearing Officer. As the proposed SAC states, "Judicial Hearing Officers (JHO) were required to be appointed to the [TPVA] pursuant to the New York Vehicle and Traffic Law Section 1690 and the JHO statute and rules." (*Id* ¶3 1(a).)

Defendants oppose leave to amend, raising only the argument that amendment would be futile. *(See* Defs.' May 16, 2006 Letter.) According to Defendants, as a matter of law they had no authority to appoint Levine to the TVPA position. *(Id.* at 5-6.) Levine does not provide any response to these arguments.

The proposed SAC alleges that "[t]he basic requirement for a retired JHO to be appointed to the TPVA is that the chairman of the Republic Party must make a recommendation to the Chief Administrative Judge (Defendant McCABE) who in turn would make the recommendation to Defendant LIPPMAN. He would

routinely rubber-stamp and approve McCABE's appointments." (SAC ¶ 3 1(d).) According to Defendants, this characterization of the TPVA appointment process is at odds with both reality and law. Defendants cite to Title A of Chapter
24 of the Nassau County Administrative Code, which provides that "there shall be a department of the Nassau County government known as the Nassau County Traffic and Parking Violations Agency, which shall operate under the control and direction of the County Executive." Nassau County Administrative Code, § 24-1.1, *available at*
http://www.nassaucountyny.gov/website/GenericServices/docsINassauCountyAdminCode_Jan2006.pdf.
Defendants also reference the June 2, 2003 Legislative Calendar, submitted by Levine with his June 14, 2004 Opposition to the Motion to Dismiss, which indicates that the Nassau County Executive is responsible for making appointments to the TPVA. *(See* Defs.' May 16, 2006 Letter at 6 (citing Pl.'s Affirm. to Oppose Mot. to Dismiss, dated June 14, 2004, Ex. 15).)

The County Administrative Code indicates that Defendant Lippman, the Chief Administrative Judge for the Unified Court System of New York, has no authority over the appointments to the TVPA. Furthermore, the Code puts the authority entirely in the hands of the County Executive, rather than any County judicial authorities, like Defendant McCabe. Thus, neither Defendant Lippman nor McCabe had any authority to grant or deny the position to Levine. Plaintiff does not proffer any argument or allegation in response to counter Defendants' assertions.

Because Defendants did not have any authority pursuant to statute to deprive Levine of the position of which he claims to have been deprived, they could not

have refused to appointment him. Accordingly, amendment to bring a claim against Defendants regarding Levine's non-appointment to the TVPA would be futile as it must fail as a matter of law.

Conclusion

In sum, the Court GRANTS Defendants' motion to dismiss the § 1983 claim against Defendant McCabe and the Title VII claim in its entirety. The Court DENIES, however, Defendants' motion to dismiss the § 1983 claim as against Defendant Lippman. The Court further DENIES Levine's motion for leave to submit the proposed SAC.

SO ORDERED.

Dated: Central Islip, New York
September 19, 2006

_____/s/_____
Denis R. Hurley
United States Senior District Judge

APPENDIX G
MEMORANDUM & ORDER
December 17, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

SAMUEL M. LEVINE,

Plaintiff,

-against-

EDWARD F. Mc CABE, and
JONATHAN LIPPMAN,

Defendants.

----------X

03-CV-6420 (DRH) (ETB)
MEMORANDUM & ORDER

APPEARANCES:

SAMUEL LEVINE
Plaintiff Pro Se
711 Shore Road (2-E)
Long Beach, New York 11561

MICHAEL COLONDER
OFFICE OF COURT ADMINISTRATION FOR THE STATE OF NEW YORK
Attorneys for Defendants
Empire State *Plaza*
4ESP, Suite 2001
Albany, NY 12223
By: John Joseph Sullivan, Esq.

ANDREW CUOMO
OFFICE OF THE ATTORNEY GENERAL OF NEW YORK
Attorneys for Defendants
300 Motor Parkway, Suite 205
Hauppauge, New York 11788
By: Susan M. Connolly, Esq.

HURLEY, Senior District Judge:

Plaintiff Samuel Levine ("Plaintiff' or "Levine"), a retired Nassau County District Judge, brought the present suit against Defendants Jonathan Lippman ("Lippman"), Chief Case 2:03-cv-06420-DRH-ETB Document 59 Filed 12/17/07 Page 2 of 20 Administrative Judge for the New York State Unified Court System, and Edward G. McCabe ("McCabe")7, the Administrative Judge of the Courts of Nassau County, alleging that Defendants' refusal to appoint him "judicial hearing officer," violated the First Amendment and Title VII. By Memorandum and Order dated September 19, 2006, familiarity with which shall be presumed, the Court granted Defendants' motion to dismiss the § 1983 claim against Defendant McCabe and the Title VII claim in its entirety but denied Defendants' motion to dismiss the § 1983 as against Defendant Lippman. The Court also denied Levine's motion for leave to leave to file his proposed Second Amended Complaint ("SAC"). Presently before the

---

7 Lippman and McCabe shall collectively be referred to as "Defendants."

Court are two motions. One motion is by Levine and seeks renewal and reconsideration of the motion for leave to serve the proposed SAC and the dismissal of the claims against McCabe. The other motion is by Defendants for summary judgment. For the reasons that follow, Plaintiff's motion is DENIED and Defendants' motion is GRANTED.

Background

The following summary of the facts is drawn from the Court's September 19, 2006 Memorandum and Order, and the most recent submissions by the parties. According to Levine's complaint and the documents attached thereto, Levine has been a practicing attorney in New York since 1950. In 1996 he was elected to a term as a Nassau County District Court Judge for the county's "First District," and as such, apparently automatically became the "President of the Board of Judges" or the "presiding judge" of the Nassau County District Courts. The New York Times described Levine as "a perennial Democratic also-ran in predominantly Republican Nassau County," and his election was apparently something of an upset. Levine states that as presiding judge of the Nassau County District Courts, he was supposed to be "in charge of the daily operation and administration of the District Court subject to the control and reporting to Defendant McCabe." But according to Levine, McCabe, as a Republican, maneuvered to keep all power and authority in his own hands. Levine also insists that McCabe "ignored and failed to act on many serious problems in the District Court set forth [in] Levine['s] reports and recommendations," and made efforts to prevent Levine from presiding over a politically-charged case. McCabe's motives, insists Levine, were "political retaliation and

prejudice" against him.

On December 31, 1999, having apparently reached the age of 70, Levine retired pursuant to the New York Constitution's mandatory judicial retirement provision.8 Shortly prior to his retirement, Levine applied to be designated as a judicial hearing officer ("JHO"), pursuant to the provisions of the New York Judiciary Law. According to Levine, he satisfied the statutory and regulatory requirements, in that he was "well qualified" to be a JHO, and his application included an "extraordinary array of supporting documentation" to prove it.

On January 26, 2000, Levine was interviewed by the judicial hearing officer selection advisory committee appointed by Lippman for Nassau County. Levine believes that the committee received and reviewed a report from McCabe recommending that his application be denied, and that the committee recommended the same. In a letter dated March 9, 2000, Lippman informed Levine that his application had been denied. Levine's immediate request for reconsideration of that decision was denied in a subsequent letter from Lippman, dated March 30, 2000. Levine asserts that he was "denied the right and opportunity to receive a copy of [McCabe's] negative report and recommendations," that the Defendants "failed to submit or serve [him with] any written charges or complaints concerning his conduct or services or other facts impacting on the questions of competence, work ethic, experience or

---

8 The New York Constitution, Article VI, § 25(b) states in relevant part: "Each ... judge of the district court shall retire on the last day of December in the year in which he or she reaches the age of seventy."

judicial temperament," and that he was "denied notice of any such charges or complaints."

On June 30, 2001, Levine submitted a new application to be a JHO, this time in Queens County. This application was denied as well, but without any further interview or hearing.

On December 23, 2003, Levine filed the present suit pursuant to 42 U.S.C. § 1983, seeking a declaratory judgment that New York's statutory scheme for appointment of judicial hearing officers is unconstitutional, a declaratory judgment that the Defendants violated various types of his civil rights, as well as $1,200,000 in money damages and $300,000 in costs and fees from Defendants. Defendants moved to dismiss the suit, on the grounds that Levine's Complaint brought claims barred by the applicable statute of limitations, and because Levine had failed to state equal protection and due process claims.

In a February 23, 2005 Memorandum and Order, this Court dismissed, as time-barred, the § 1983 claims relating to the denial of Levine's first application for appointment as a JHO. The Court further dismissed Levine's claims that New York's statutory scheme violated the equal protection and due process clauses of the U.S. Constitution. Having concluded Levine failed to state any timely and viable federal claim and declining to exercise supplemental jurisdiction over any potential remaining state law claims, the Court thus dismissed the Complaint in its entirety. However, Levine was granted leave to submit an amended complaint with respect to his claim that his second application for appointment as a JHO was denied as a result of political retaliation. (See Feb. 23, 2005 Mem. & Order, at 12.) The Court noted that an employment retaliation claim cannot be raised under the Equal

Protection Clause, although it may properly be brought pursuant to the First Amendment or Title VII. (*Id.* at 24.)

Thereafter, Levine submitted an Amended Complaint, alleging that the denial of his application for appointment as a JHO violated his civil rights pursuant to 42 U.S.C. § 1983 and Title VII, 42 U.S.C. § 2000e, *et seq.* Defendants moved to dismiss the Amended Complaint, again for failure to state a claim pursuant to Rule 12(b)(6). Levine opposed the motion in his "Memorandum of Law for Second Amended Complaint," which posed arguments both in opposition to Defendants' motion and in support of his motion to submit a Second Amended Complaint. In its September 19, 2006 Memorandum and Order, the Court granted the motion to dismiss the § 1983 claim against McCabe on the grounds it was barred by the statute of limitations but denied Lippman's motion for the same relief on the grounds that the Amended Complaint alleged that Lippman's denial of Levine's second application, submitted in 2001, was a discriminatory act. Defendants' motion to dismiss Levine's First Amendment claims on the ground that a JHO is a policymaker was denied as the parties failed to provide the Court with any facts that would merit a decision either way. Further, the Court denied Levine's motion to amend his complaint to add a claim that he was deprived of a JHO appointment to the Nassau County Traffic and Parking Violations Agency, finding the proposed amendment would be futile as the Defendants did not have any authority to appoint him to that agency.

Defendants' current motion submits the following information regarding JHOs, which information is uncontested unless otherwise noted.

One who has served as a judge or justice of a court of record in New York State[9] or of a city court but no longer holds judicial office for reasons other than removal therefrom, may be designated by the chief administrator of the Courts as a JHO. N.Y. Judiciary Law §850(1). In designating a former judge as a JHO, the chief administrator must determine that the former judge has the mental and physical capability to perform the duties of the office and the services of the individual are necessary to expedite court business. Id. The chief administrator fixes the term of each JHO and may establish panels of JHOs for such courts or geographical areas as deemed appropriate and assignments of a JHO are to be made as required by the needs of the court and rules promulgated by the chief administrator. *Id.* at §§ 850(2), 851(1).

Pursuant to the Judiciary Law, the chief administrator has promulgated rules governing the appointment of JHOs. *See* 22 N.Y. Comp. Codes R. & Regs.("NYCRR") Part 122. Pursuant to these rules the chief administrator has discretion to designate an eligible applicant upon determining that the applicant "has the physical and mental capacity, competence, work ethic, experience and judicial temperament necessary to perform the duties of a judicial hearing officer, and is well qualified to serve on the panels in the court to which he or she will be designated." 22 NYCRR § 122.2(a). An applicant is required to pass a comprehensive physical by a physician designated by the chief administrator. 22 NYCRR § 122.2(b). The

---

9 Pursuant to the New York State Constitution, Supreme Court Justices, as well as County Court and District Court Judges are elected. See N.Y. Const. Art. 6, §§ 6, 10, 16.

rules provide that in exercising his discretion, the chief administrator shall consult with the presiding justice of the appropriate appellate division, the appropriate local administrative judge, who submits a written evaluation of the applicant, and the appropriate JHO selection committee.10 22 NYCRR § 122.2(c). The chief administrator may also consult "other appropriate persons and bar associations," as well as conduct whatever investigation deemed necessary. 22 NYCRR § 122.2(d). Once approved, a JHO is appointed for a one year term, which may be extended for an additional year. 22 NYCRR § 122.3. Once appointed, the JHO joins the panel in the district in which s/he has been designated. 22 NYCRR § 122.5. Depending on the needs of the courts in the assigned district, the Administrative Judge for the District assigns JHOs from the panel to

---

10 The chief administrator has established a number of JHO selection advisory committees to assist him in the designation of JHOs. Each committee has seven members appointed by the chief administrator. Three members are either current or former judges and the remaining four members are practicing attorneys. 22 NYCRR § 122.2(e)(1). The advisory committee interviews each applicant and may require the submission of additional information. The advisory committee is charged with evaluating the applicant's fitness to serve as a JHO, taking into account the applicant's competence, work ethic, experience and judicial temperament. In evaluating an applicant's competence, the committee considers effective case management and prompt case disposition, knowledge of the law and clarity of written opinions. As to work ethic, the committee considers punctuality, preparation and attentiveness and meeting commitments on time and according to the rules of court. Finally, with respect to experience and temperament, the committee considers the nature, length and proximity in time of judicial service and the ability to deal patiently with and be courteous to all parties and participants. 22 NYCRR § 122.2(f).

work in specific parts or on a case-by-case basis. 22 NYCRR § 122.6. The rules specifically provide that "nothing herein shall vest any person with any right to be designated as a judicial hearing officer." 22 NYCRR § 122.7.

The Judiciary Law leaves open the powers of a JHO by providing that they "shall have such powers as provided by law." *Id.* at § 853. Under New York law, JHOs serve in both criminal and civil matters.

In criminal matters, JHOs function in three different ways. First, a local criminal court may, with the parties consent, assign a JHO to conduct the trial of most types of informations.11 N.Y. Crim Pro. Law §350.20. When such an assignment is made, the JHO has "the same power as a judge of the court," including the power to issue sentences of imprisonment, and the JHO's actions are "deemed the action of the court." *Id.* at §§ 380.10, 350.20; New York Penal Law §§ 55.10, 70.15. Second, JHOs are authorized to preside over proceedings involving certain traffic and parking infractions in Nassau County even absent consent of the parties. *Id.* Third, a judge in any criminal court may assign pre-trial motions to a JHO. In connection therewith, the JHO may hold any necessary hearings. The JHO does not determine the motion but files a report setting forth findings of fact and conclusions of law and that report is considered by the court in ultimately determining the motion. N.Y. Crim Pro. Law

---

11 An information is a verified accusatory instrument used to charge a person with one or more non-felony (i.e., misdemeanor, violation or traffic infraction) offenses. N.Y. Crim Pro. Law § 1.20(4). JHOs are not authorized to conduct trials of informations which contain at least one count which charges a Class A misdemeanor. Id. at §350.20(4).

§ 255.20

Pursuant to the New York Civil Practice Law and Rules, JHOs are vested with the same powers and duties as referees. N.Y. C.P.L.R. 4301. In the civil arena, the powers of a JHO are determined by the order of reference and an order of reference requires the consent of the parties except in limited circumstances. Upon such consent of the parties, a JHO may be assigned by a judge "to determine the entire action or specific issues, to report issues, to perform particular acts, or to receive and report evidence only." C.P.L.R. 4311. The order of reference must specify what kind of reference it is, to wit: a reference to determine, a reference to report, a reference to perform a particular act or a reference to receive and report evidence. Where the order of reference is one to determine or one to perform a particular act, the JHO "shall have the same powers of a court in performing like function" except the power "to relieve himself of his duties, to appoint a successor or adjudge any person except a witness before him guilty of contempt." C.P.L.R. 4301. In the absence of the parties' consent, at the court's discretion, a JHO may determine (1) a cause of action or an issue where examination of a long account is required, or (2) any separately triable issue of damages that does not require a trial by jury. C.P.L.R. 4317. JHOs may also supervise, on behalf of the assigning judge, evidentiary disclosure, C.P.L.R. 3104, and are authorized to hear and report in tax certiorari proceedings to review real property assessments, N.Y. Real Prop. Tax Law §§ 700, 720.

Defendants contend that distinct from the JHOs described above, there are JHOs who are appointed pursuant to section 1690(1) of the New York Vehicle and Traffic Law and serve exclusively in the Nassau

County Traffic and Parking Violations Agency (the "TPVA"), "a department of the Nassau county government" which is "operate[d] under the direction and control of the Nassau county executive. These "TPVA" JHOs have different qualifications and powers, do not go through the same selection and appointment process, and are employed by an agency that is a department of the Nassau County government. According to Defendants, "[t]he Unified Court System does not hire, fire or pay "TPVA" JHOs. The only role played by the Unified Court System is that the District Administrative Judge issues an annual administrative order to "approve and assign" — as opposed to hire or appoint — various individuals to serve as a TPVA JHO. Plaintiff, relying primarily on statements contained in the New York Court of Appeals decision in *Dolce v. Nassau County Traffic & Parking Violations Agency*, 7 N.Y.3d 492 (2006), contends that the TPVA is an arm of the District Court, that its JHOs must be appointed pursuant to the Judiciary Law and the rules promulgated by the chief administrator, and its JHOs are, in fact, appointed by Administrative Judge.

Discussion

I. Standard

A. Summary Judgment

Summary judgment pursuant to Federal Rule of Civil Procedure 56 is only appropriate where admissible evidence in the form of affidavits, deposition transcripts, or other documentation demonstrates both the absence of a genuine issue of material fact and one party's entitlement to judgment as a matter of law. See *Viola v. Philips Med. Sys. of N. Am.*, 42 F.3d 712, 716 (2d Cir. 1994). The relevant governing law in each case determines which facts are material; "only disputes over

facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). No genuinely triable factual issue exists when the moving party demonstrates, on the basis of the pleadings and submitted evidence, and after drawing all inferences and resolving all ambiguities in favor of the non-movant, that no rational jury could find in the non-movant's favor. See *Chertkova v. Conn. Gen'l Life Ins. Co.*, 92 F.3d 81, 86 (2d Cir. 1996) (citing Fed. R. Civ. P. 56(c)).

To defeat a summary judgment motion properly supported by affidavits, depositions, or other documentation, the non-movant must offer similar materials setting forth specific facts that show that there is a genuine issue of material fact to be tried. See *Rule v. Brine, Inc.*, 85 F.3d 1002, 1011 (2d Cir. 1996). The non-movant must present more than a "scintilla of evidence," *Del. & Hudson Ry. Co. v. Cons. Rail Corp.*, 902 F.2d 174, 178 (2d Cir. 1990) (quoting *Anderson*, 477 U.S. at 252), or "some metaphysical doubt as to the material facts," *Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir. 1993) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)), and cannot rely on the allegations in his or her pleadings, conclusory statements, or on "mere assertions that affidavits supporting the motion are not credible." *Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir. 1996) (internal citations omitted). Affidavits submitted in opposition to summary judgment must be based on personal knowledge, must "set forth such facts as would be admissible in evidence," and must show that the affiant is "competent to testify to the matters stated therein." *Patterson v. County of Oneida*, 375 F.3d

206, 219 (2d Cir. 2004) (citing Fed. R. Civ. P. 56(e)). "Rule 56(e)'s requirement the affiant have personal knowledge and be competent to testify to the matters asserted in the affidavit also means that an affidavit's hearsay assertions that would not be admissible at trial if testified to by the affiant is insufficient to create a genuine issue for trial." *Patterson*, 375 F.3d at 219 (citing *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 160 (2d Cir. 1999)).

When determining whether a genuinely disputed factual issue exists, "a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability," or "the substantive evidentiary standards that apply to the case." *Anderson*, 477 U.S. at 254-55. A district court considering a summary judgment motion must also be "mindful of the underlying standards and burdens of proof," *Pickett v. RTS Helicopter*, 128 F.3d 925, 928 (5th Cir. 1997) (citing *Anderson*, 477 U.S. at 252), because the evidentiary burdens that the respective parties will bear at trial guide the district court in its determination of a summary judgment motion. *See Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir. 1988). Where the non-moving party will bear the ultimate burden of proof on an issue at trial, the moving party's burden under Rule 56 will be satisfied if he can point to an absence of evidence to support an essential element of the non-movant's claim. *See id.* at 210-11. Where a movant without the underlying burden of proof offers evidence that the non-movant has failed to establish her claim, the burden shifts to the non-movant to offer "persuasive evidence that [her] claim is not `implausible." *Brady*, 863 F.2d at 211 (citing *Matsushita*, 475 U.S. at 587).

In deciding a summary judgment motion, a court

must resolve all factual ambiguities and draw all reasonable inferences in favor of the non-moving party. See *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 57 (2d Cir. 1987). That being said, it is well-established that a non-movant cannot defeat summary judgment with nothing more than "unsupported assertions," *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995), or the allegations in its pleadings. *See Cifarelli v. Vill. of Babylon*, 93 F.3d 47, 51 (2d Cir. 1996); *see also* Fed. R. Civ. P. 56(e). Finally, the Court notes that as a lawyer, Levine "cannot claim the special consideration which courts customarily grant to pro se parties." *Harbulak v. Suffolk County*, 654 F.2d 194, 198 (2d Cir. 1981).

B. Motion for Reconsideration

Plaintiff's motion for reconsideration is governed by Local Rule 6.3 which provides in pertinent part:

> A notice of motion for reconsideration or re-argument of a court order determining a motion shall be served within ten (10) days after the court's determination of the original motion, or, in the case of a court order resulting in a judgment, within ten (10) days after entry of judgment.

Local Rule of the Southern and Eastern District of New York 6.3.

The decision to grant or deny a motion for reconsideration lies squarely within the discretion of the district court. *See Devlin v. Transp. Comm'ns Union*, 175 F.3d 121, 132 (2d Cir. 1999). The standard for a motion for reconsideration "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or

[factual] data that the court overlooked — matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *see also Arum v. Miller*, 304 F. Supp. 2d 344, 347 (E.D.N.Y. 2003) ("To grant such a motion the Court must find that it overlooked matters or controlling decisions which, if considered by the Court, would have mandated a different result.") (citation and internal quotation marks omitted). "The major grounds justifying reconsideration are `an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atl. Airways, Ltd. v. National Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4478 at 790). Thus, a "party may not advance new facts, issues, or arguments not previously presented to the Court." *National Union Fire Ins. Co. v. Stroh Cos.*, 265 F.3d 97, 115 (2d Cir. 2001) (quoting *Polsby v. St. Martin's Press*, No. 97 Civ. 690, 2000 WL 98057, at *1 (S.D.N.Y. Jan. 18, 2000)).

II. Judicial Hearing Officers as Policymakers

While maintaining that the decision not to appoint Levine a JHO was based on the merits of his qualifications, Defendants move for summary judgment contending that, even if political affiliation did play a part in the denial of his application, the First Amendment was not violated because a JHO is a policymaker.

The Supreme Court has ruled that the First Amendment permits dismissals of policymakers because of their political affiliation, when the employer can

establish that party affiliation is an appropriate requirement for the effective performance of the public office involved. See *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Branti v. Finkel*, 445 U.S. 507, 518 (1980)). The Second Circuit has identified eight pertinent factors to be considered in the policymaker analysis, including:

> whether the employee (1) is exempt from civil service protection, (2) has some technical competence or expertise, (3) controls others, (4) is authorized to speak in the name of the policymakers, (5) is perceived as a policymaker by the public, (6) influences government programs, (7) has contact with elected officials, and (8) is responsive to partisan politics and political leaders.

Almonte v. City of Long Beach, 478 F.3d 100, 110 (2d Cir. 2007) (quoting *Vezzetti v. Pellegrini*, 22 F.3d 483, 486 (2d Cir. 1994)). These factors are not exhaustive and no one factor is always dispositive. Id. at 486. It is the job description or what the employee could do, rather than job performance or what the employee actually does, that controls the analysis. *See Gordon v. County of Rockland*, 110 F.3d 886, 888 (2d Cir. 1997); *Regan v. Boogertman*, 984 F.2d 577, 580 (2d Cir. 1993). Whether a person is a policymaker is a question of law. *See Danahy v. Buscaglia*, 134 F.3d 1185, 1191 (2d Cir. 1998); *Gordon*, 110 F.3d at 888-889 (2d Cir. 1997).

Consideration of these factors reveal that a JHO is a policymaker and therefore exempted from First Amendment protection against political patronage dismissals.

First, JHOs are not protected by civil service law. Rather they are appointed for a one year term that may be renewed for a second year and are paid on a per diem

basis. Second, JHOs have special expertise, both as an attorney, *see, e.g., Butler v. N. Y. State Dept. of Law*, 211 F.3d 739, 744 (2d Cir. 2000); *Adler v. Pataki*, 185 F.3d 35, 46 (2d Cir. 1999), and as one who previously served as a judge or justice. JHOs do not control others in terms of have an established staff to supervise. However, to the extent that in the course of performing their duties JHOs have "all the powers of a court in performing a like function," they do control attorneys, litigants and spectators in the courtroom.

As to the remaining factors, the Second Circuit has condensed them into "whether the employee in question is empowered to act and speak on behalf of a policymaker, especially an elected official." *Butler*, 211 F.3d at 744 (quoting *Gordon v. County of Rockland*, 110 F.3d at 890. Here, JHOs, in the course of performing their duties, whether civil or criminal, act "in the same manner as a court" and have "all the powers of a court performing a like function." N.Y. Crim. Pro. Law §§ 255.20, 350.20; C.P.L.R. 4301. JHOs therefore are empowered to act and speak on behalf of judges, who in New York, are themselves elected officials.

Consideration of the relevant factors leads this Court to conclude that JHOs are policymakers for First Amendment purposes.

This Court's conclusion that JHOs are policymakers comports with the decisions reached by those courts which have examined whether judicial or quasi-judicial officers are policymakers. For example, in *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir. 1988), one of the issues was whether judge *pro tempore* is a policymaking position to which political criteria could be applied. In concluding that a judge *pro tempore* is a policymaking, the Court wrote:

> A judge both makes and implements governmental policy. A judge may be suspicious of the police or sympathetic to them, stem or lenient in sentencing, and political debates rage about such questions. In most states judges are elected, implying that the office has a political component. Holders of the appointing authority may seek to ensure that judges agree with them on important jurisprudential questions. The Governor of Indiana was entitled to consider Krajewski's views about the role of judges - or even simply Krajewski's political affiliation- when making the appointment, just as the voters may consider these factors without violating the first amendment when deciding whether to retain Judge Krajewski in office. (We put aside all debate about whether recourse to politics in selecting judges is good or bad; we are concerned only with the constraints the first amendment imposes on the way the State of Indiana prefers to organize its government.) What is true about the office of judge is true about the office of judge *pro tempore*. It is the same job; only the tenure of the officeholder differs. The regular judge holds office for four years; the judge *pro tempore* holds office at the pleasure of the regular judge. Since the disposition under Elrod and Branti depends on the duties of the office rather than the tenure of the incumbent, it follows that political beliefs may be the basis for the appointment of a judge *pro tempore*.

Id. at 770. *Accord Newman v. Voinovich*, 986 F.2d 159, 163 (6th Cir. 1993) (holding judges are policymakers "because their political beliefs influence and dictate

their decisions on important jurisprudential matters"). *Cf. Gregory v. Ashcroft*, 501 U.S. 451 (1991) (holding state court judges are policymaking employees under the Age Discrimination Employment Act).

Similarly, in *Ajfrunti v. Zwirn*, 892 F. Supp. 451 (E.D.N.Y. 1995), *aff'd*, 100 F.3d 943, 1996 WL 53625 (2d Cir. 1996), the court concluded that members of a Town Board of Zoning Appeals, a "quasi-judicial body that occupies a central role in [the] implement[ation] of the Town['s] ... zoning ordinance" are policymakers, not protected by the First Amendment against adverse employment action due to their political affiliations. *Id.* at 458. *Accord Pleva v. Norquist*, 195 F.3d 905 (7th Cir. 1999) (holding members of Milwaukee Board of Zoning Appeals to be a policymaker). *Cf.' Walsh v. Heilman*, 472 F.3d 504 (7th Cir. 2006) (holding hearing officer, whose position was equivalent to what other states would call a city judge or justice of the peace, is policymaker for First Amendment purposes); *Garretto v. Cooperman*, 510 F. Supp. 816 (S.D.N.Y. 1981) aff'd, 794 F.2d 676 (2d Cir. 1984) (holding New York State worker's compensation judge is a policymaker for purposes of *Elrod-Branti* and therefore denial of reappointment because of political affiliation did not violate the First Amendment).

New York State JHOs are policymakers and therefore exempted from First Amendment protection against political patronage appointments and dismissals. Accordingly, Defendants' motion for summary judgment is granted.

III. The Motion for Reconsideration

A. The Application is Untimely

Under the Local Rules, Plaintiff was required to

move for reconsideration no later than October 3, 2006 — ten days after the Court's determination of the Motion.12 He did not. Even if he did not receive a copy of the Memorandum and Order on the day it was filed, Plaintiff should have moved for reconsideration within ten (10) days of when he did receive it. According to the handwritten notation on the back of the first page of the copy of the September 19, 2006 Memorandum & Order Levine submitted with his motion papers, he received a copy of the decision from the Court's Pro Se Clerk on November 29, 2006. Even assuming that the clock should start on November 29, 2006 and stop when he wrote to the Court seeking leave to move to reargue,13 Plaintiff's application is untimely.

An extension of time to file a motion for reconsideration under Local Rule 6.3 is not forbidden by Federal Rule of Civil Procedure 6(b) and, therefore, a district court has discretion to grant such an extension. *Lichtenberg v. Besicorp Group Inc.*, 204 F.3d 397, 403 (2d Cir. 2000); *Weisner v. 321 West 16th St. Assocs.*, 2000 WL 1585680, at * 2 (S.D.N.Y. Oct. 25, 2000). At no time did Levine request such an extension of time. While the Court is cognizant of the fact that Levine is proceeding pro se, Levine is also a practicing attorney.

---

12 There was no judgment as a result of the September 19, 2006 Memorandum and Order and, therefore, the portion of the Rule allowing a reconsideration motion to be made within ten days after of entry of judgment is inapplicable.

13 Rule 2(A) of this Court's Individual Practice Rules requires the submission of a promotion conference letter seeking leave to file certain motions. However, motions for reconsideration pursuant to Local Rule 6.3 are specifically excluded from that requirement. See Individual Practice Rule 2(A)(v).

Practicing attorneys who choose to represent themselves cannot claim the special considerations normally afforded to pro se litigants. *See Harbulak v. Suffolk* County, 654 F.2d at 198.

In sum, Levine's Motion for Reconsideration made pursuant to Local Rule 6.3 is untimely. However, assuming *arguendo* that the application is deemed timely, as set forth below the Motion for Reconsideration is denied.

B. The Proposed Amendment of the Complaint Would be Futile

The Court has reviewed the Plaintiff's arguments in great detail, and concludes that Plaintiff's motion does not point out controlling decisions or data the Court overlooked.14 Rather, Levine points to "new" evidence which he contends demonstrates that, contrary to this Court's prior decision, Defendants do have the power to appoint him to the TPVA. While it is unclear whether and why this "new" evidence was unavailable at the time of the prior motion, the Court shall, in any event, address it.

The allegedly new evidence is a document entitled "State of New York County of Nassau Administrative Order" and dated January 17, 2006. It reads, in pertinent part as follows:

Pursuant to the authority vested in me by

---

14 Levine contends that the Court overlooked the allegation in paragraphs 31a to 31e in the Proposed Second Amended Complaint in holding the claims against McCabe were time-barred. The allegations were not, however, overlooked. Rather, none of these allegations support an inference that McCabe took action in the years 2000, 2001, 2002 or 2003 to deprive Levine of a Judicial Hearing Officer Appointment.

> Section 1690(1) of the Vehicle and Traffic Law and Section 350.20(5) of the Criminal Procedure Law, I hereby approve and assign the following Village Justices and/or retired Judges to serve as Judicial hearing Officers in the Nassau County Traffic and parking Violations Agency towards its statutory purpose to assist the Nassau County District Court in the disposition of parking and traffic violations in accordance with General Municipal law 370(1), 371(2). The term of this assignment is effective retroactively to January 1, 2006 and shall expire on December 31, 2006.

Pl.'s Ex. M4. The document then lists sixteen individuals and is purportedly signed by the Honorable Anthony Marano, Administrative Judge, Nassau County.

Levine contends that this document, together with dicta contained in *Dolce v. Nassau County Traffic and Parking Violations Agency*, 7 N.Y.3d 492 (2006), demonstrates that Defendant McCabe did in fact have the power to appoint him as a JHO to the TPVA. Even assuming, however, that McCabe did have the authority to appointment Levine to the TPVA, allowing Levine to amend his complaint would remain futile. As detailed above, even if McCabe had the power to appoint Levine to the TPVA and refused to do so because of Levine's political affiliation, the First Amendment is not violated because JHOs are policymakers.

Accordingly, Levine's motion for reconsideration is denied.

Conclusion

In sum, the Court GRANTS Defendants' motion for summary judgment and DENIES Levine's motion

for reconsideration. The Clerk of Court is directed to serve a copy of this Memorandum and Order on the Plaintiff and to close this case.

SO ORDERED.

Dated: Central Islip, New York, December 17, 2007

/s/

Denis R. Hurley
United States Senior District Judge

APPENDIX H
VERIFIED COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
SAMUEL M. LEVINE,

Plaintiff,

- against - Civil Docket #

EDWARD F. McCABE and
JONATHAN LIPPMAN,

Defendants.
----------X

VERIFIED COMPLAINT

Plaintiff SAMUEL M. LEVINE, complaining of the Defendants by his attorney SAMUEL M. LEVINE, ESQ., pro se, alleges as follows:

PARTIES

1. Plaintiff SAMUEL M. LEVINE has been an attorney duly admitted to practice law in New York State since December of 1950. He served as a duly elected Judge of the District Court of Nassau County and President of the Board of Judges from January 1, 1997 to December 31, 1999, when he was required to retire as a judge because of the age 70 rule in the New York State Constitution.

2. Defendant JONATHAN LIPPMAN at all times mentioned herein, has been the Chief

Administrative Judge of all of the courts in New York State for the Unified Court System of New York State. (See the New York State Constitution, Article VI, Sec. 28; Rules of the Chief Judge 22 NYCRR Part 1, and Administrative Delegations, 22 NYCRR Part 80; New York Judiciary Law Section 210.) These statutes and rules gave Defendant LIPPMAN the power, functions and duties to supervise the administration and operation of the Unified Court System of New York State.

3. That at all times mentioned herein, Defendant EDWARD G. McCABE has been the Administrative Judge of all of the courts in Nassau County, New York, by designation of the Defendant LIPPMAN.

JURISDICTION

4. Plaintiff LEVINE claims federal jurisdiction pursuant to Article III, Section 2 of the United States Constitution, including Declaratory relief as to the constitutionality of laws.

5. Plaintiff also claims federal jurisdiction for violations of certain protections guaranteed to him by the Fifth and Fourteenth Amendments to the Constitution, including Due Process and Equal Protection of Law. Also, protections under 42 United States Code Section 1983.

FIRST CAUSE OF ACTION
CONSTITUTIONALITY OF JUDICIAL HEARING OFFICER LAWS

6. New York State has established an

unconstitutional statutory scheme to allow Defendant LIPPMAN to appoint Judicial Hearing Officers. (See N.Y. Judiciary Law Article 7A - Judicial Administration; 22 NYCRR Part 122 - Rules of Court - Judiciary Hearing Officers; and Judiciary Law Article 22 - Judicial Hearing Officers.)

7. Defendant LIPPMAN adopted policies and practices that relied on the written evaluation, report and recommendation of the appropriate Administrative Judge in the county affected by the Judicial Hearing Officer appointment.

8. On October 27, 1999, Plaintiff LEVINE submitted an Application for Initial Designation as a Judicial Hearing Officer pursuant to N.Y. Judiciary Law, Article 22 and 22 NYCRR Part 122, to serve in the Courts of Nassau, Suffolk or Queens Counties.

9. Plaintiff LEVINE was well qualified and had the physical and mental capacity, competence, work ethic, experience and judicial temperament necessary to perform the duties of a Judicial Hearing Officer. (Section 122.2)

10. On January 26, 2000, Plaintiff LEVINE had an interview with the Judicial Hearing Officer Selection Advisory Committee appointed by Defendant LIPPMAN for Nassau County.

11. Upon information and belief, the Advisory Committee had received and reviewed a report by Defendant McCABE to Defendant LIPPMAN which recommended DENIAL of Judicial Hearing Officer status to Plaintiff LEVINE. The Advisory Committee

thereupon followed Defendant McCABE'S Recommendation and recommended Denial of the Plaintiff's Judicial Hearing Officer application to Defendant LIPPMAN. It was denied by letter of Defendant LIPPMAN dated March 9, 2000. No proper due process hearing was provided to Plaintiff LEVINE.

12. Plaintiff LEVINE requested a Reconsideration of the Denial by letter dated March 17, 2000 to Defendant LIPPMAN. The Reconsideration was also denied by letter of March 30, 2000 from Defendant LIPPMAN.

13. The Defendants McCABE and LIPPMAN ignored or failed to give due consideration to the extraordinary array of supporting documentation submitted by Plaintiff LEVINE with the Judicial Hearing Officer application and request for Reconsideration; nor was he afforded a fair hearing or due process of law.

14. Plaintiff LEVINE was denied the right and opportunity to receive a copy of the negative report and recommendations of Defendant McCABE.

15. Defendants McCABE and LIPPMAN failed to submit to or serve on Plaintiff LEVINE any written charges or complaints concerning his conduct or services or other facts impacting on the questions of competence, work ethic, experience or judicial temperament.

16. Plaintiff LEVINE was denied Notice of any such charges or complaints. He was also denied a due process fair hearing before a duly constituted judicial or

administrative tribunal.

17. Plaintiff LEVINE was denied the equal protection of laws afforded to non-retired sitting judges on the N.Y. Unified Court System in the process and procedures established by the New York State Commission on Judicial Conduct pursuant to N.Y. Judiciary Law Article 2-A and Rules by the Commission on Judicial Conduct. (Complaint, investigation, hearing, disposition, etc.)

18. On June 30, 2001, Plaintiff LEVINE submitted a new application for appointment as a Judicial Hearing Officer to serve in Queens County.

19. The Judicial Hearing Officer Selection Advisory Committee for Queens County failed to even provide Plaintiff LEVINE with an interview or hearing. The requirements of 22 NYCRR Part 122 were thus violated. Upon information and belief, Defendant LIPPMAN DENIED this 2001 application based on the 1999 report and recommendation of Defendant McCABE.

20. Prior to November 5, 1996, the Defendant McCABE exercised complete control over the operation and administration of the courts in Nassau County involving about one hundred judges, justices and judicial hearing officers, as well as hundreds of non-judicial court personnel. He had been elected by the Republican Party.

21. Upon information and belief, at all times mentioned herein, the leadership of the Republican Party of Nassau County was very involved in

administrative and legislative affairs and actions concerning the judicial, executive and legislative branches of government in Nassau County.

22. Prior to November 5, 1996, Defendant McCABE, a former County Attorney in a Republican Administration, was elected as a Justice of the Supreme Court by the Republican Party.

23. For several years prior to November 5, 1996, Defendant McCABE arranged for the appointment of the President of the Board of Judges of the District Court (Unified District Court Act Section 2406 - the Judge from the First District, elected by the Republican Party - to be the Supervising Judge or Presiding Judge of the District Court. That Judge was in charge of the daily operation and administration of the District Court subject to the control and reporting to Defendant McCABE.

24. Shortly after Plaintiff LEVINE was elected as the Judge from the First District, as a Democrat, on November 5, 1996, thereby obtaining the title of President of the Board of Judges, the Administrative Judge, Defendant McCABE advised Plaintiff LEVINE that he will not be appointed Supervising Judge of the District Court, nor would he have any of the authority or power over the operations and administration of the Court. Thus an act of POLITICAL RETALIATION was committed by Defendant McCABE.

25. In the ensuing three years that Plaintiff LEVINE served as a Judge of the District Court with the title of President of the Board of Judges, Defendant McCABE ignored and failed to act on many serious

problems in the District Court set forth on LEVINE reports and recommendations presented to Defendant McCABE by Plaintiff LEVINE, to deal with these problems.

26. In 1997, 1998 and 1999, reports on over twenty-four subject area problems were submitted to Defendant McCABE by Plaintiff LEVINE, including the following: Security for the Courthouse; Utilization and Assignment of Judges; Expanded Use of Arbitrators, Judicial Hearing Officers, Mediators and Alternative Dispute Resolution; a Public-Friendly Court; Protecting the Rights of the Poor, the Elderly and People With Disabilities; Town Courts and Night Courts; Criminal and Civil Practice Procedures; Un-executed Arrest Warrants; Jobs and Promotions; Pre-Trial Conferences; Telephone Conferencing; Public Trust and Confidence in the Legal System; etc.

27. Another act of political retaliation and prejudice against Plaintiff LEVINE occurred when Defendant McCABE interfered with Plaintiff LEVINE'S jurisdiction and presiding over pre-trial motions in a politically charged case. The case involved criminal charges by a wife against her husband who were both engaged in a bitter divorce conflict in the Supreme Court in Nassau County. Defendant McCABE made efforts to remove Plaintiff LEVINE from presiding over the pre-trial motions.

28. Since January 1, 2000, Plaintiff LEVINE has been available to serve as a Judicial Hearing Officer in the Courts of Nassau, Suffolk and Queens Counties, in New York State.

29. Defendant's failure to appoint Plaintiff LEVINE as a Judicial Hearing Officer has resulted in financial loss of compensation for Judicial Hearing Officer services. Plaintiff has been DAMAGED thereby.

30. Attached hereto and made a part of this Complaint are two news media articles containing facts that accurately describe the political and administrative factors that were involved in Defendant McCABE'S decisions, reports and recommendations, which DENIED Plaintiff LEVINE of the position of Supervising Judge of the District Court, Nassau County and as a Judicial Hearing Officer following his retirement as of January 1, 2000. (See *New York Times* article dated December 30, 1996 by Bruce Lambert - "A Nassau Politician Lost Till He Won. Or Did He?"; also, *Newsday* article by Irving Long dated December 3, 1996 - "How Presiding Judge Will Get to Preside."

31. Defendant McCABE'S actions and conduct described herein were wrongful, illegal, willful and intentional in violating the civil rights of Plaintiff LEVINE.

32. The decision and actions by the Defendants subjected Plaintiff LEVINE to a deprivation of the rights, privileges and immunities secured by the Constitution and laws of the United States and the State of New York. Plaintiff was damaged thereby. (42 USC 1983)

33. The defense of Judicial Immunity is not available to Defendants since their actions and conduct were of an administrative nature in their

administrative capacities, and not in their judicial capacity in dealing with litigation and litigants before them.

34. The Statutory Scheme established by the laws and court rules for New York State relating to the appointment of Judicial Hearing Officers violated the civil rights of Plaintiff LEVINE and were in violation of the Fifth and Fourteenth Amendments of the United States Constitution, particularly the provisions relating to DUE PROCESS OF LAW and EQUAL PROTECTION OF LAWS.

35. Plaintiff LEVINE seeks a Declaratory Judgment to Declare that the Statutory Scheme and all provisions of law referred to hereinabove, relating to the appointment of Judicial Hearing Officers, are in violation of the United States Constitution and particularly the Fifth and Fourteenth Amendments thereto.

SECOND CAUSE OF ACTION
VIOLATIONS OF PLAINTIFF'S
CIVIL RIGHTS (42 USC 1983)

36. Plaintiff repeats and reiterates all of the allegations and facts set forth in paragraphs 1 to 35 herein, with the full force and effect as if more fully set forth.

37. Plaintiff LEVINE'S civil rights were violated by Defendants McCABE and LIPPMAN who, under color of statutes, ordinances, rules, regulations, custom and usage in the State of New York, subjected Plaintiff LEVINE, a citizen of the United States, to the

deprivation of rights, privileges and immunities secured by the United States Constitution and laws. (42 USC 1983)

38. Plaintiff LEVINE has been damaged thereby and suffered financial loss as a result thereof.

THIRD CAUSE OF ACTION
DAMAGES

39. Plaintiff LEVINE repeats and reiterates all of the allegations and facts stated in paragraphs 1 to 38 hereinabove, with the full force and effect as if more fully set forth herein.

40. Plaintiff demands Judgment for Damages sustained.

FOURTH CAUSE OF ACTION
LEGAL FEES AND COSTS

41. Plaintiff LEVINE repeats and reiterates all of the allegations and facts stated in paragraphs 1 to 40 hereinabove, with the full force and effect as if more fully set forth herein.

42. Plaintiff LEVINE seeks to recover legal fees and costs pursuant to 42 USC 1988.

FIFTH CAUSE OF ACTION

43. Plaintiff repeats and reiterates all previous paragraphs 1 to 42 as if more fully set forth herein.

44. Plaintiff seeks such other relief as may be

just and proper.

WHEREFORE, Plaintiff LEVINE demands Judgment against Defendants McCABE and LIPPMAN as follows:

FIRST CAUSE OF ACTION: Declaring New York State's Statutory Scheme relating to the appointment of Judicial Hearing Officers as set forth in New York Judiciary Law, Article 7-A (Judicial Administration); 22 NYCRR Part 122 (Rules of Court - Judicial Hearing Officers); New York Judiciary Law Article 22 (Judicial Hearing Officers) is unconstitutional, including each of the sections and parts thereof.

SECOND CAUSE OF ACTION: Declaring that Plaintiff LEVINE'S Civil Rights have been violated by Defendants acting under color of law, and that he has been deprived of rights, privileges and immunities secured by the Constitution and laws of the United States and New York State. (42 USC 1983)

THIRD CAUSE OF ACTION: A money Judgment against Defendant McCABE in favor of Plaintiff LEVINE for damages in the sum of NINE HUNDRED THOUSAND DOLLARS ($900,000) plus interest; also, a money Judgment against Defendant LIPPMAN for THREE HUNDRED THOUSAND DOLLARS ($300,000), plus interest.

FOURTH CAUSE OF ACTION: A money judgment against Defendants McCABE and LIPPMAN jointly, for $300,000 covering legal fees and costs pursuant to 42 USC 1988.

FIFTH CAUSE OF ACTION: Such other relief as may be just and proper.

October 1, 2003

/s/
SAMUEL M. LEVINE, ESQ.
Attorney for Plaintiff Levine, Pro Se
711 Shore Road (2 E)
Long Beach, New York 11561
(516) 889-0496

VERIFICATION

State of New York, County of Nassau: ss.:

SAMUEL M. LEVINE, plaintiff herein and attorney admitted to practice in New York State, does hereby affirm under the penalties of perjury, that I have read the foregoing Complaint; know the contents thereof; that same is true to my own knowledge and belief.

Sworn to October , 2003

/s/
SAMUEL M. LEVINE, ESQ.

APPENDIX I
AMENDED COMPLAINT
Dated: November 18, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
SAMUEL M. LEVINE,

Plaintiff,

- against - # CV 03 6420

EDWARD F. McCABE and
JONATHAN LIPPMAN,

Defendants.
----------X

AMENDED COMPLAINT

HON. DENIS R. HURLEY
HON. M. BOYLE

Plaintiff SAMUEL M. LEVINE, complaining of the Defendants by his attorney SAMUEL M. LEVINE, ESQ., *pro se*, alleges as follows:

PARTIES

1. Plaintiff SAMUEL M. LEVINE has been an attorney duly admitted to practice law in New York State since December of 1950. He served as a duly elected Judge of the District Court of Nassau County and President of the Board of Judges from January 1, 1997 to December 31, 1999, when he was required to retire as a judge because of the age 70 rule in the New York State Constitution.

2. Defendant JONATHAN LIPPMAN at all times mentioned herein, has been the Chief Administrative Judge of all of the courts in New York State for the Unified Court System of New York State. (See the New York State Constitution, Article VI, Sec. 28; Rules of the Chief Judge 22 NYCRR Part 1, and Administrative Delegations, 22 NYCRR Part 80; New York Judiciary Law Section 210.) These statutes and rules gave Defendant LIPPMAN the power, functions and duties to supervise the administration and operation of the Unified Court System of New York State.

3. That at all times mentioned herein, Defendant EDWARD G. McCABE has been the Administrative Judge of all of the courts in Nassau County, New York, by designation of the Defendant LIPPMAN.

JURISDICTION

4. Plaintiff LEVINE claims federal jurisdiction pursuant to Article III, Section 2 of the United States Constitution, including Declaratory relief as to the constitutionality of laws.

5. Plaintiff also claims federal jurisdiction for violations of certain protections guaranteed to him by the First, Fifth and Fourteenth Amendments to the Constitution, including Freedom of Speech, Due Process and Equal Protection of Law. Also, protections under 42 United States Code Section 1983, Title VII of the Civil Rights Act of 1964 (42 USC 2000(e) et seq.)

FIRST CAUSE OF ACTION -

VIOLATIONS OF PLAINTIFF'S CIVIL RIGHTS (42 USC 1983) - DENIAL OF FREE SPEECH; POLITICAL RETALIATION; BIAS AND PREJUDICE

6. New York State has established an unconstitutional statutory scheme to allow Defendant LIPPMAN to appoint Judicial Hearing Officers. (See N.Y. Judiciary Law Article 7A - Judicial Administration; 22 NYCRR Part 122 - Rules of Court - Judiciary Hearing Officers; and Judiciary Law Article 22 - Judicial Hearing Officers.)

7. Defendant LIPPMAN adopted policies and practices that relied on the written evaluation, report and recommendation of the appropriate Administrative Judge in the county affected by the Judicial Hearing Officer appointment.

8. On October 27, 1999, Plaintiff LEVINE submitted an Application for Initial Designation as a Judicial Hearing Officer pursuant to N.Y. Judiciary Law, Article 22 and 22 NYCRR Part 122, to serve in the Courts of Nassau, Suffolk or Queens Counties.

9. Plaintiff LEVINE was well qualified and had the physical and mental capacity, competence, work ethic, experience and judicial temperament necessary to perform the duties of a Judicial Hearing Officer. (Section 122.2)

10. On January 26, 2000, Plaintiff LEVINE had an interview with the Judicial Hearing Officer Selection Advisory Committee appointed by Defendant LIPPMAN for Nassau County.

11. Upon information and belief, the Advisory Committee had received and reviewed a report by Defendant McCABE to Defendant LIPPMAN which recommended DENIAL of Judicial Hearing Officer status to Plaintiff LEVINE. The Advisory Committee thereupon followed Defendant McCABE'S Recommendation and recommended Denial of the Plaintiff's Judicial Hearing Officer application to Defendant LIPPMAN. It was denied by letter of Defendant LIPPMAN dated March 9, 2000. No proper due process hearing was provided to Plaintiff LEVINE.

12. Plaintiff LEVINE requested a Reconsideration fo the Denial by letter dated March 17, 2000 to Defendant LIPPMAN. The Reconsideration was also denied by letter of March 30, 2000 from Defendant LIPPMAN.

13. The Defendants McCABE and LIPPMAN ignored or failed to give due consideration to the extraordinary array of supporting documentation submitted by Plaintiff LEVINE with the Judicial Hearing Officer application and request for Reconsideration; nor was he afforded a fair hearing or due process of law.

14. Plaintiff LEVINE was denied the right and opportunity to receive a copy of the negative report and recommendations of Defendant McCABE.

15. Defendants McCABE and LIPPMAN failed to submit to or serve on Plaintiff LEVINE any written charges or complaints concerning his conduct or services or other facts impacting on the questions of

competence, work ethic, experience or judicial temperament.

16. Plaintiff LEVINE was denied Notice of any such charges or complaints. He was also denied a due process fair hearing before a duly constituted judicial or administrative tribunal.

17. Plaintiff LEVINE was denied the equal protection and due process of laws afforded to non-retired sitting judges on the N.Y. Unified Court System in the process and procedures established by the New York State Commission on Judicial Conduct pursuant to N.Y. Judiciary Law Article 2-A and Rules by the Commission on Judicial Conduct. (Complaint, investigation, hearing, disposition, etc.)

18. On June 30, 2001, Plaintiff LEVINE submitted a new application for appointment as a Judicial Hearing Officer to serve in Queens County.

19. The Judicial Hearing Officer Selection Advisory Committee for Queens County failed to even provide Plaintiff LEVINE with an interview or hearing. The requirements of 22 NYCRR Part 122 were thus violated. Upon information and belief, Defendant LIPPMAN DENIED this 2001 application based on the 1999 report and recommendation of Defendant McCABE.

20. Prior to November 5, 1996, the Defendant McCABE exercised complete control over the operation and administration of the courts in Nassau County involving about one hundred judges, justices and judicial hearing officers, as well as hundreds of non-

judicial court personnel. He had been elected by the Republican Party.

21. Upon information and belief, at all times mentioned herein, the leadership of the Republican Party of Nassau County was very involved in administrative and legislative affairs and actions concerning the judicial, executive and legislative branches of government in Nassau County.

22. Prior to November 5, 1996, Defendant McCABE, a former County Attorney in a Republican Administration, was elected as a Justice of the Supreme Court by the Republican Party.

23. For several years prior to November 5, 1996, Defendant McCABE arranged for the appointment of the President of the Board of Judges of the District Court (Unified District Court Act Section 2406 - the Judge from the First District, elected by the Republican Party - to be the Supervising Judge or Presiding Judge of the District Court. That Judge was in charge of the daily operation and administration of the District Court subject to the control and reporting to Defendant McCABE.

24. Shortly after Plaintiff LEVINE was elected as the Judge from the First District, as a Democrat, on November 5, 1996, thereby obtaining the title of President of the Board of Judges, the Administrative Judge, Defendant McCABE advised Plaintiff LEVINE that he will not be appointed Supervising Judge of the District Court, nor would he have any of the authority or power over the operations and administration of the Court. Thus an act of POLITICAL RETALIATION was

committed by Defendant McCABE.

25. In the ensuing three years that Plaintiff LEVINE served as a Judge of the District Court with the title of President of the Board of Judges, Defendant McCABE ignored and failed to act on many serious problems in the District Court set forth on LEVINE reports and recommendations presented to Defendant McCABE by Plaintiff LEVINE, to deal with these problems.

26. In 1997, 1998 and 1999, reports on over twenty-four subject area problems were submitted to Defendant McCABE by Plaintiff LEVINE, including the following: Security for the Courthouse; Utilization and Assignment of Judges; Expanded Use of Arbitrators, Judicial Hearing Officers, Mediators and Alternative Dispute Resolution; a Public-Friendly Court; Protecting the Rights of the Poor, the Elderly and People With Disabilities; Town Courts and Night Courts; Criminal and Civil Practice Procedures; Un-executed Arrest Warrants; Jobs and Promotions; Pre-Trial Conferences; Telephone Conferencing; Public Trust and Confidence in the Legal System; etc.

27. Another act of political retaliation and prejudice against Plaintiff LEVINE occurred when Defendant McCABE interfered with Plaintiff LEVINE'S jurisdiction and presiding over pre-trial motions in a politically charged case. The case involved criminal charges by a wife against her husband who were both engaged in a bitter divorce conflict in the Supreme Court in Nassau County. Defendant McCABE made efforts to remove Plaintiff LEVINE from presiding over the pre-trial motions.

28. Since January 1, 2000, Plaintiff LEVINE has been available to serve as a Judicial Hearing Officer in the Courts of Nassau, Suffolk and Queens Counties, in New York State.

29. Defendant's failure to appoint Plaintiff LEVINE as a Judicial Hearing Officer has resulted in financial loss of compensation for Judicial Hearing Officer services. Plaintiff has been DAMAGED thereby.

30. Attached hereto and made a part of this Complaint are two news media articles containing facts that accurately describe the political and administrative factors that were involved in Defendant McCABE'S decisions, reports and recommendations, which DENIED Plaintiff LEVINE of the position of Supervising Judge of the District Court, Nassau County and as a Judicial Hearing Officer following his retirement as of January 1, 2000. (See *New York Times* article dated December 30, 1996 by Bruce Lambert - "A Nassau Politician Lost Till He Won. Or Did He?"; also, *Newsday* article by Irving Long dated December 3, 1996 - "How Presiding Judge Will Get to Preside."

31. Defendant McCABE'S actions and conduct described herein were wrongful, illegal, wilful and intentional in violating the civil rights of Plaintiff LEVINE.

32. The decision and actions by the Defendants subjected Plaintiff LEVINE to a deprivation of the rights, privileges and immunities secured by the Constitution and laws of the United States and the

State of New York. Plaintiff was damaged thereby. (42 USC 1983.)

33. The defense of Judicial Immunity is not available to Defendants since their actions and conduct were of an administrative nature in their administrative capacities, and not in their judicial capacity in dealing with litigation and litigants before them.

34. Defendants committed acts of POLITICAL RETALIATION by denying Plaintiff LEVINE the appointment as a Judicial Hearing Officer, in violation of his Civil Rights.

35. Plaintiff LEVINE'S civil rights were violated by Defendants McCABE and LIPPMAN who, under color of statutes, ordinances, rules, regulations, custom and usage in the State of New York, subjected Plaintiff LEVINE, a citizen of the United States, to the deprivation of rights, privileges and immunities secured by the United States Constitution and laws. (42 USC 1983.)

36. Plaintiff LEVINE has been damaged thereby and suffered financial loss as a result thereof.

SECOND CAUSE OF ACTION -DISCRIMINATION

37. Plaintiff repeats and reiterates all of the allegations and facts set forth in paragraphs 1 to 35 herein, with the full force and effect as if more fully set forth.

38. Defendants (particularly McCABE) violated Title VII of the Civil Rights Act of 1964. (42 USC 2000 e to 2000 e-17.) Plaintiff LEVINE was wrongfully denied appointment as a Judicial Hearing Officer because of his political affiliation in the past as a member of the Democratic Party and the fact that he won the election for Judge in 1996. He was thus DISCRIMINATED for his PAST POLITICAL AFFILIATION. An ACT OF POLITICAL RETALIATION WAS PERPETRATED BY DEFENDANT McCABE.

39. Plaintiff had a right to be affiliated with and become a judicial candidate for the Democratic Party. He also had a right to report about judicial and administrative problems in the District Court of Nassau County while he served as a judge in that court. Defendants were aware of such rights. The exercise of those rights by Plaintiff led to the action of Defendants in denying his application for Judicial Hearing Officer status.

40. Plaintiff alleges that Defendants intentionally treated him differently than other applicants for Judicial Hearing Officer status. He was the only applicant involved or subjected to retaliatory action and political discrimination as a Democrat who exercised his right of free speech.

41. The aforesaid actions by Defendants constituted an unlawful employment practice by Defendants.

42. Plaintiff LEVINE has been damaged thereby and suffered financial loss.

WHEREFORE Plaintiff demands Judgment against the Defendants as follows:

1. A money judgment against Defendants in the sum of Two Million Dollars for violation of Plaintiff's Civil Rights and Discrimination.

2. Money judgment against Defendants for legal fees, costs and expenses. (42 USC 1985.)

3. Judgment enjoining and directing Defendants to appoint Plaintiff SAMUEL M. LEVINE a New York State Judicial Hearing Officer.

4. Such other relief as may be proper.

A JURY TRIAL IS DEMANDED.

Dated: November 18, 2005

SAMUEL M. LEVINE, ESQ
Attorney and Plaintiff *Pro Se*
711 Shore Road (2-E)
Long Beach, New York 11561
(516) 889-0496

VERIFICATION

State of New York, County of Nassau: ss.:

SAMUEL M. LEVINE, plaintiff herein and attorney admitted to practice in New York State, does hereby affirm under the penalties of perjury, that I have read the foregoing Amended Complaint; know the contents thereof; that same is true to my own knowledge and belief.

/s/_____

Sworn to November 18, 2005

APPENDIX J
SECOND AMENDED COMPLAINT
Dated: May 5, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
SAMUEL M. LEVINE,

Plaintiff,

- against - # CV 03 6420

EDWARD F. McCABE and
JONATHAN LIPPMAN,

Defendants.
----------X
SECOND AMENDED COMPLAINT

HON. DENIS R. HURLEY
HON. M. BOYLE

Plaintiff SAMUEL M. LEVINE, complaining of the Defendants by his attorney SAMUEL M. LEVINE, ESQ., pro se, alleges as follows:

PARTIES

1. Plaintiff SAMUEL M. LEVINE has been an attorney duly admitted to practice law in New York State since December of 1950. He served as a duly elected Judge of the District Court of Nassau County and President of the Board of Judges from January 1, 1997 to December 31, 1999, when he was required to retire as a judge because of the age 70 rule in the New York State Constitution.

2. Defendant JONATHAN LIPPMAN at all times mentioned herein, has been the Chief Administrative Judge of all of the courts in New York State for the Unified Court System of New York State. (See the New York State Constitution, Article VI, Sec. 28; Rules of the Chief Judge 22 NYCRR Part 1, and Administrative Delegations, 22 NYCRR Part 80; New York Judiciary Law Section 210.) These statutes and rules gave Defendant LIPPMAN the power, functions and duties to supervise the administration and operation of the Unified Court System of New York State.

3. That at all times mentioned herein, Defendant EDWARD G. McCABE has been the Administrative Judge of all of the courts in Nassau County, New York, by designation of the Defendant LIPPMAN.

JURISDICTION

4. Plaintiff LEVINE claims federal jurisdiction pursuant to Article III, Section 2 of the United States Constitution, including Declaratory relief as to the constitutionality of laws.

5. Plaintiff also claims federal jurisdiction for violations of certain protections guaranteed to him by the First, Fifth and Fourteenth Amendments to the Constitution, including Freedom of Speech, Due Process and Equal Protection of Law. Also, protections under 42 United States Code Section 1983, Title VII of the Civil Rights Act of 1964 (42 USC 2000(e) et seq.)

FIRST CAUSE OF ACTION -
VIOLATIONS OF PLAINTIFF'S CIVIL RIGHTS
(42 USC 1983) -
DENIAL OF FREE SPEECH; POLITICAL
RETALIATION; BIAS AND PREJUDICE

6. New York State has established an unconstitutional statutory scheme to allow Defendant LIPPMAN to appoint Judicial Hearing Officers. (See N.Y. Judiciary Law Article 7A - Judicial Administration; 22 NYCRR Part 122 - Rules of Court - Judiciary Hearing Officers; and Judiciary Law Article 22 - Judicial Hearing Officers.)

7. Defendant LIPPMAN adopted policies and practices that relied on the written evaluation, report and recommendation of the appropriate Administrative Judge in the county affected by the Judicial Hearing Officer appointment.

8. On October 27, 1999, Plaintiff LEVINE submitted an Application for Initial Designation as a Judicial Hearing Officer pursuant to N.Y. Judiciary Law, Article 22 and 22 NYCRR Part 122, to serve in the Courts of Nassau, Suffolk or Queens Counties.

9. Plaintiff LEVINE was well qualified and had the physical and mental capacity, competence, work ethic, experience and judicial temperament necessary to perform the duties of a Judicial Hearing Officer. (Section 122.2)

10. On January 26, 2000, Plaintiff LEVINE had an interview with the Judicial Hearing Officer Selection Advisory Committee appointed by Defendant LIPPMAN

for Nassau County.

11. Upon information and belief, the Advisory Committee had received and reviewed a report by Defendant McCABE to Defendant LIPPMAN which recommended DENIAL of Judicial Hearing Officer status to Plaintiff LEVINE. The Advisory Committee thereupon followed Defendant McCABE'S Recommendation and recommended Denial of the Plaintiff's Judicial Hearing Officer application to Defendant LIPPMAN. It was denied by letter of Defendant LIPPMAN dated March 9, 2000. No proper due process hearing was provided to Plaintiff LEVINE.

12. Plaintiff LEVINE requested a Reconsideration of the Denial by letter dated March 17, 2000 to Defendant LIPPMAN. The Reconsideration was also denied by letter of March 30, 2000 from Defendant LIPPMAN.

13. The Defendants McCABE and LIPPMAN ignored or failed to give due consideration to the extraordinary array of supporting documentation submitted by Plaintiff LEVINE with the Judicial Hearing Officer application and request for Reconsideration; nor was he afforded a fair hearing or due process of law.

14. Plaintiff LEVINE was denied the right and opportunity to receive a copy of the negative report and recommendations of Defendant McCABE.

15. Defendants McCABE and LIPPMAN failed to submit to or serve on Plaintiff LEVINE any written charges or complaints concerning his conduct or

services or other facts impacting on the questions of competence, work ethic, experience or judicial temperament.

16. Plaintiff LEVINE was denied Notice of any such charges or complaints. He was also denied a due process fair hearing before a duly constituted judicial or administrative tribunal.

17. Plaintiff LEVINE was denied the equal protection and due process of laws afforded to non-retired sitting judges on the N.Y. Unified Court System in the process and procedures established by the New York State Commission on Judicial Conduct pursuant to N.Y. Judiciary Law Article 2-A and Rules by the Commission on Judicial Conduct. (Complaint, investigation, hearing, disposition, etc.)

18. On June 30, 2001, Plaintiff LEVINE submitted a new application for appointment as a Judicial Hearing Officer to serve in Queens County.

19. The Judicial Hearing Officer Selection Advisory Committee for Queens County failed to even provide Plaintiff LEVINE with an interview or hearing. The requirements of 22 NYCRR Part 122 were thus violated. Upon information and belief, Defendant LIPPMAN DENIED this 2001 application based on the 1999 report and recommendation of Defendant McCABE.

20. Prior to November 5, 1996, the Defendant McCABE exercised complete control over the operation and administration of the courts in Nassau County involving about one hundred judges, justices and

judicial hearing officers, as well as hundreds of non-judicial court personnel. He had been elected by the Republican Party.

21. Upon information and belief, at all times mentioned herein, the leadership of the Republican Party of Nassau County was very involved in administrative and legislative affairs and actions concerning the judicial, executive and legislative branches of government in Nassau County.

22. Prior to November 5, 1996, Defendant McCABE, a former County Attorney in a Republican Administration, was elected as a Justice of the Supreme Court by the Republican Party.

23. For several years prior to November 5, 1996, Defendant McCABE arranged for the appointment of the President of the Board of Judges of the District Court (Unified District Court Act Section 2406 - the Judge from the First District, elected by the Republican Party - to be the Supervising Judge or Presiding Judge of the District Court. That Judge was in charge of the daily operation and administration of the District Court subject to the control and reporting to Defendant McCABE.

24. Shortly after Plaintiff LEVINE was elected as the Judge from the First District, as a Democrat, on November 5, 1996, thereby obtaining the title of President of the Board of Judges, the Administrative Judge, Defendant McCABE advised Plaintiff LEVINE that he will not be appointed Supervising Judge of the District Court, nor would he have any of the authority or power over the operations and administration of the

Court. Thus an act of POLITICAL RETALIATION was committed by Defendant McCABE.

24(a). Plaintiff's immediate predecessor was HON. ARTHUR EIBERSON, who was appointed by Defendants as the Presiding and Supervising Judge of the District Court. He was a Deputy County Attorney under Defendant McCABE (serving a Republican County Administration). Republican Party patronage (for jobs and contracts) were under their protection. That policy and practice existed in the courts, as well.

24(b). As of January 1, 2005, another Republican Judge - HON. DENISE SHER - became the Presiding and Supervising Judge of the District Court based on actions taken by Defendants. Thus, a policy has been adopted and in effect -established by Defendants - that only judges elected by the Republican Party, will be appointed and serve as the Presiding and Supervising Judge of the District Court of Nassau County.

24(c). Plaintiff was thereby denied any policy-making role in the Administration of the District Court.

25. In the ensuing three years that Plaintiff LEVINE served as a Judge of the District Court with the title of President of the Board of Judges, Defendant McCABE ignored and failed to act on many serious problems in the District Court set forth on LEVINE reports and recommendations presented to Defendant McCABE by Plaintiff LEVINE, to deal with these problems.

26. In 1997, 1998 and 1999, reports on over twenty-four subject area problems were submitted to

Defendant McCABE by Plaintiff LEVINE, including the following: Security for the Courthouse; Utilization and Assignment of Judges; Expanded Use of Arbitrators, Judicial Hearing Officers, Mediators and Alternative Dispute Resolution; a Public-Friendly Court; Protecting the Rights of the Poor, the Elderly and People With Disabilities; Town Courts and Night Courts; Criminal and Civil Practice Procedures; Un-executed Arrest Warrants; Jobs and Promotions; Pre-Trial Conferences; Telephone Conferencing; Public Trust and Confidence in the Legal System; etc.

27. Another act of political retaliation and prejudice against Plaintiff LEVINE occurred when Defendant McCABE interfered with Plaintiff LEVINE'S jurisdiction and presiding over pre-trial motions in a politically charged case. The case involved criminal charges by a wife against her husband who were both engaged in a bitter divorce conflict in the Supreme Court in Nassau County. Defendant McCABE made efforts to remove Plaintiff LEVINE from presiding over the pre-trial motions.

28. Since January 1, 2000, Plaintiff LEVINE has been available to serve as a Judicial Hearing Officer in the Courts of Nassau, Suffolk and Queens Counties, in New York State.

29. Defendant's failure to appoint Plaintiff LEVINE as a Judicial Hearing Officer has resulted in financial loss of compensation for Judicial Hearing Officer services. Plaintiff has been DAMAGED thereby.

30. Attached hereto and made a part of this Complaint are two news media articles containing facts

that accurately describe the political and administrative factors that were involved in Defendant McCABE'S decisions, reports and recommendations, which DENIED Plaintiff LEVINE of the position of Supervising Judge of the District Court, Nassau County and as a Judicial Hearing Officer following his retirement as of January 1, 2000. (See *New York Times* article dated December 30, 1996 by Bruce Lambert - "A Nassau Politician Lost Till He Won. Or Did He?"; also, *Newsday* article by Irving Long dated December 3, 1996 - "How Presiding Judge Will Get to Preside."

31. Defendant McCABE'S actions and conduct described herein were wrongful, illegal, wilful and intentional in violating the civil rights of Plaintiff LEVINE.

POLITICS AND TRAFFIC COURT
JUDICIAL HEARING OFFICERS

31(a). Judicial Hearing Officers (JHO) were required to be appointed to the Nassau County Traffic and Parking Violation Agency (TPVA) pursuant to the New York Vehicle and Traffic Law Section 1690 and the JHO statutes and rules.

31(b). Since January 1, 2000, Plaintiff LEVINE has sought appointment to the TPVA. Defendants have refused to so appoint Plaintiff, because he was a Democrat who filed reports about "Problems in the District Court of Nassau County." Thus, he was a class of one who was the only retired Democratic District Court Judge qualified to serve in the TPVA. Defendants intended to punish Plaintiff for exercising

his freedom of speech rights in filing reports about "Problems in the District Court." That denial of JHO status was part of Defendant McCABE'S retaliation for Democrat LEVINE winning the 1996 election and writing about the "Problems in the District Court."

31(c). Plaintiff LEVINE as a trial court judge at the civil small claims and criminal misdemeanor level was NOT IN A POLICY MAKING POSITION. Judicial Hearing Officers, including those serving in the Traffic and Parking Violations Agency in Nassau County (TPVA) are certainly not policy makers.

31(d). The basic requirement for a retired JHO to be appointed to the TPVA is that the chairman of the Republican Party must make a recommendation to the Chief Administrative Judge (Defendant McCABE) who in turn would make the recommendation to Defendant LIPPMAN. He would routinely rubber-stamp and approve McCABE'S appointments.

31(f). Thus, there existed a (Republican) political litmus test for judicial and non-judicial appointments to the courts in Nassau County. Plaintiff LEVINE was discriminated against because he did not meet that (Republican) political litmus test.

31(e). Defendants agreed to protect the political control of non-judicial personnel appointments to the courts in Nassau County. Recommendations made by the Chairman of the Republican Party to Defendant McCABE were routinely rubber-stamped, approved and appointed by Defendants. (See *New York Times* and *Newsday* articles attached to the Complaint.)

32. The decision and actions by the Defendants subjected Plaintiff LEVINE to a deprivation of the rights, privileges and immunities secured by the Constitution and laws of the United States and the State of New York. Plaintiff was damaged thereby. (42 USC 1983.)

33. The defense of Judicial Immunity is not available to Defendants since their actions and conduct were of an administrative nature in their administrative capacities, and not in their judicial capacity in dealing with litigation and litigants before them.

34. Defendants committed acts of POLITICAL RETALIATION by denying Plaintiff LEVINE the appointment as a Judicial Hearing Officer, in violation of his Civil Rights.

35. Plaintiff LEVINE'S civil rights were violated by Defendants McCABE and LIPPMAN who, under color of statutes, ordinances, rules, regulations, custom and usage in the State of New York, subjected Plaintiff LEVINE, a citizen of the United States, to the deprivation of rights, privileges and immunities secured by the United States Constitution and laws. (42 USC 1983.)

36. Plaintiff LEVINE has been damaged thereby and suffered financial loss as a result thereof.

SECOND CAUSE OF ACTION - DISCRIMINATION

37. Plaintiff repeats and reiterates all of the

allegations and facts set forth in paragraphs 1 to 35 herein, with the full force and effect as if more fully set forth.

38. Defendants (particularly McCABE) violated Title VII of the Civil Rights Act of 1964. (42 USC 2000 e to 2000 e-17.) Plaintiff LEVINE was wrongfully denied appointment as a Judicial Hearing Officer because of his political affiliation in the past as a member of the Democratic Party and the fact that he won the election for Judge in 1996. He was thus DISCRIMINATED for his PAST POLITICAL AFFILIATION. An ACT OF POLITICAL RETALIATION WAS PERPETRATED BY DEFENDANT McCABE.

39. Plaintiff had a right to be affiliated with and become a judicial candidate for the Democratic Party. He also had a right to report about judicial and administrative problems in the District Court of Nassau County while he served as a judge in that court. Defendants were aware of such rights. The exercise of those rights by Plaintiff led to the action of Defendants in denying his application for Judicial Hearing Officer status.

40. Plaintiff alleges that Defendants intentionally treated him differently than other applicants for Judicial Hearing Officer status. He was the only applicant involved or subjected to retaliatory action and political discrimination as a Democrat who exercised his right of free speech.

40(a). Plaintiff's right to free speech was violated by Defendants as described hereinabove.

40(b). Plaintiff claims that his right to EQUAL PROTECTION and to be FREE FROM DISCRIMINATION, were violated by Defendants, in that he was wrongfully singled out for political discrimination and political retaliation by Defendants by being denied Judicial Hearing Officer status.

40(c). Plaintiff was not granted a FAIR HEARING OR FAIR CONSIDERATION of his applications for JHO appointment.

40(d). Plaintiff's damages included lost income from being denied an appointment as a Judicial Hearing Officer. Other damage includes damage to his reputation as a respected leader in the legal and judicial community, as well as in the public domain. Defendant suffered a STIGMA from being a judge denied further judicial appointment and service to the public as a judge.

41. The aforesaid actions by Defendants constituted an unlawful employment practice by Defendants.

42. Plaintiff LEVINE has been damaged thereby and suffered financial loss.

WHEREFORE Plaintiff demands Judgment against the Defendants as follows:

1. A money judgment against Defendants in the sum of Two Million Dollars for violation of Plaintiff's Civil Rights and Discrimination.

2. Money judgment against Defendants for legal fees, costs and expenses. (42 USC 1985.)

3. Judgment enjoining and directing Defendants to appoint Plaintiff SAMUEL M. LEVINE a New York State Judicial Hearing Officer.

4. Such other relief as may be proper.

A JURY TRIAL IS DEMANDED.

Dated: May 5, 2006

/s/
SAMUEL M. LEVINE, ESQ.
Attorney and Plaintiff Pro Se
711 Shore Road (2-E)
Long Beach, New York 11561
(516) 889-0496

VERIFICATION

State of New York, County of Nassau: ss.:

SAMUEL M. LEVINE, plaintiff herein and attorney admitted to practice in New York State, does hereby affirm under the penalties of perjury, that I have read the foregoing Amended Complaint; know the contents thereof; that same is true to my own knowledge and belief.

/s/

Sworn to May 5, 2006